Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

DENARD M. FOBBS, M.D.,

Petitioner,

vs.

HOLY CROSS HEALTH SYSTEM CORPORATION, a California Corporation, doing business as SAINT AGNES HOSPITAL AND MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM, M.D.; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; and LARRY E. NIX, M.D.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the United States Court of Appeals for the Ninth Circuit uphold summary judgment premised on the expiration of a one-year statute of limitations where the wrongful act was not complete until less than one year prior to the filing of the underlying complaint?

2. May the United States Court of Appeals for the Ninth Circuit uphold summary judgment premised on the expiration of a one-year statute of limitations where the petitioner set forth a showing of equitable tolling through a time within one year of the date of filing of the underlying complaint?

3. May the United States Court of Appeals for the Ninth Circuit uphold summary judgment premised on the expiration of a one-year statute of limitations where the petitioner showed that the respondents made representations to the petitioner, relied upon by petitioner, that the wrongful act would not be complete until a time within one year of the filing of the underlying complaint?

4. May the United States Court of Appeals for the Ninth Circuit uphold summary judgment premised on the expiration of a one-year statute of limitations where the petitioner showed a continuing violation of 42 U.S.C. § 1981, such that the last discriminatory act occurred within one year of the filing of the underlying complaint?

5. May the United States Court of Appeals for the Ninth Circuit uphold summary judgment based upon the Health Care Quality Improvement Act where the petitioner produced evidence of no imminent harm, and where the Ninth Circuit bases its decision on the existence of a mere "possibility" of harm supporting a summary action?

6. May the United States Court of Appeals for the Ninth Circuit uphold summary judgment based upon the Health Care Quality Improvement Act where the petitioner has shown deviation from the Health Care Quality Improvement Act standards as to peer review actions prior to the final peer review action?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Denard M. Fobbs, M.D., who was the plaintiff and appellant, and the respondents, Holy Cross Health System Corporation, a California Corporation doing business as Saint Agnes Hospital and Medical Center; and individual physician-defendants, Cynthia Bergmann, M.D.; James Cahill, M.D.; Jay Christensen, M.D.; Charles Gavin, M.D.; Seung Nam Kim, M.D.; Robert Meltvedt, M.D.; Marshall Noel, M.D.; Morton Rosenstein, M.D.; Roydon Steinke, M.D.; Robert Wilson, M.D.; and Larry E. Nix, M.D.; said respondents were the defendants and appellees.

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DENARD M. FOBBS, M.D.,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Denard M. Fobbs, M.D., respectfully prays that a writ of certiorari be issued to review the judgment and

opinion of the United States Court of Appeals for the Ninth Circuit entered in the above proceedings on July 19, 1994, and the denial of petitioner's petition for rehearing on September 2, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reprinted in the appendix hereto, p. 2a, *infra.*

The memorandum decision of the United States District Court for the Eastern District of California (The Honorable Robert E. Coyle, United States District Judge), addressing the motion for summary judgment based on the statute of limitations is reprinted in the appendix hereto, p. 67a, *infra.*

The memorandum decision of the United States District Court for the Eastern District of California (The Honorable Robert E. Coyle, United States District Judge), addressing the motion for summary judgment predicated upon the Health Care Quality Improvement Act is reprinted in the appendix hereto, p. 27a, *infra*.

STATEMENT OF JURISDICTION

Petitioner Denard M. Fobbs, M.D., an African-American physician, was the holder of hospital privileges at Saint Agnes Hospital, permitting petitioner to perform intra-abdominal laser surgery as a member of the Department of Obstetrics-Gynecology/Perinatology. (Appendix, p. 6a). The hospital was a subsidiary of respondent Holy Cross Health Systems Corporation. (Appendix, p. 6a). The respondent physicians were members of various peer review committees at the hospital. (Appendix, p. 6a). Respondents summarily suspended petitioners' privileges. (Appendix, p. 6a).

On September 29, 1989, petitioner filed a complaint against the respondent hospital and the respondent physicians. (Appendix, p. 6a). The complaint included causes of action for violation of the Sherman Anti-Trust Act, 15 U.S.C. § 2; and for violation of 42 U.S.C. § 1981. (Appendix, p. 7a). On November 25, 1990, the court granted physician respondents' motion for partial summary judgment as to the § 1981 claim on the basis that it was time-barred. (Appendix, p. 7a). On March 17, 1992, the district court granted summary judgment in favor of all respondents on the Sherman Anti-Trust Act claim, holding that they were immune from federal anti-trust liability by virtue of the provisions of the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11101, *et seq.* (Appendix, p. 7a).

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit from those rulings. (Appendix, p. 7a). The Ninth Circuit affirmed the partial summary judgment as to the § 1981 claim and the partial summary judgment of the Sherman Anti-Trust Act claim. (Appendix, pp. 7a, 10a). The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101, *et seq.* In particular, 42 U.S.C. § 11112(a) provides that for the purposes of the protection from liability set forth in the Act, a professional review action must be taken:

> (1) In the reasonable belief that the action was in the furtherance of quality health care, (2) After a reasonable effort to obtain the facts of the matter, (3) After adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician involved under the circumstances, and (4) In the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(c) permits immediate suspension or restriction of privileges, subject to subsequent notice and hearing or other adequate procedures, "where the failure to take such an action may result in an imminent danger to the health of any individual."

STATEMENT OF THE CASE

Following a peer review proceeding which began in June, 1987, respondents notified petitioner on August 29, 1988 that they had decided to summarily suspend petitioner at a meeting on August 26, 1988, and that petitioner had fifteen days to request a hearing. (Appendix, pp. 68a-69a). On September 6, 1988, petitioner advised the committee that he would not appeal unless provided a hearing by an unbiased panel, not including direct competitors. (*Ibid.*). On September 15, 1988, respondents notified petitioner that he would have an additional fifteen days to request a hearing. (Appendix, pp. 70a-71a). The letter stated that in the event petitioner did not request a hearing he would be "deemed to have waived any right to a hearing and accepted the summary suspension." (*Ibid.*). On October 10, 1988, respondents wrote petitioner finally denying him the unbiased hearing he requested and stating that petitioner had "waived any right to a

hearing and accept the summary suspension." (Appendix, pp. 71a-72a). Petitioner filed the underlying action in federal court on September 29, 1989. (Appendix, p. 71a).

The peer review actions began on June 23, 1987, when the medical executive committee of the hospital imposed restrictions on petitioner's privileges. (Appendix, pp. 29a-30a). The initial restrictions were imposed without any hearing. (*Ibid.*). There was no evidence of actual imminent harm, but the Ninth Circuit interpreted the Health Care Quality Improvement Act as permitting summary actions where danger *may* result if the restraint is not imposed, even in the absence of evidence of imminent danger. (Appendix, p. 9a).

Following the initial summary restrictions, there were hearings on September 15, 1987 and September 24, 1987, resulting in a decision affirming the restrictions on October 20, 1987. (Appendix, p. 30a). That decision was vacated by the appeal board of the hospital, to permit additional evidence and representation by counsel. (Appendix, pp. 30a-31a). A subsequent hearing by the same judicial review committee again affirmed the restrictions on February 22, 1988. (Appendix, pp. 31a-32a). That decision was again successfully appealed by petitioner, the appeal board reversing the decision because petitioner had been wrongly denied the right to conduct voir dire of the judicial review committee members at previous hearings. (Appendix, pp. 31a-32a).

All of the foregoing actions involved panel members who were direct competitors of petitioner; one member who had exhibited personal animosity toward petitioner, who had treated one of the patients involved, and who was in the process of entering into a partnership with two of petitioner's accusers. (*Ibid.*). Additionally, the hearings utilized four additional cases which did not form part of the basis upon which the original summary restrictions were imposed. (*Ibid.*).

Following petitioner's second successful appeal, an additional judicial review committee was selected by the hospital with biased members, including two members who were direct competitors of petitioner and one who received referrals from petitioner's accusers. (Appendix, p. 33a). Further, the hearing officer stated that he would not allow petitioner to voir dire the hearing officer, and the committee contained no member versed in laser surgery. (*Ibid.*). Petitioner did not comply with the monitoring, and respondents acquiesced in such non-compliance, indicating that they did not consider the restrictions in good faith to protect the health of patients. (Appendix, pp. 33a-34a).

Petitioner informed the final judicial review committee on July 15, 1988 that he desired the hearing to proceed to a conclusion so that he could seek review in court, stating that although he would not physically appear at the hearing, he did not waive his right to a hearing and desired that the proceedings go to conclusion, to permit subsequent judicial review. (Appendix, pp. 34a-35a). The result was the eventual summary suspension which became final on September 30, 1989. (*Ibid.*).

Meanwhile, on September 8, 1988, petitioner filed a complaint with the Office of Civil Rights of the United States. (*Ibid.*). That agency investigated until August of 1989. (*Ibid.*). Following that investigation, petitioner filed this action on September 29, 1989. (Appendix, p. 35a).

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT ERRONEOUSLY UPHELD SUMMARY JUDGMENT BASED ON A ONE-YEAR STATUTE OF LIMITATIONS WHERE THE WRONGFUL ACT WAS NOT COMPLETE UNTIL LESS THAN ONE YEAR PRIOR TO THE FILING OF THE UNDERLYING COMPLAINT.

By erroneously granting summary judgment, the Ninth Circuit has deprived petitioner of due process of law, in violation of the Fifth Amendment to the United States Constitution. The final actions taken against petitioner occurred on September 30, 1988. State tolling rules govern federal actions under 42 U.S.C. § 1981. (*Board of Regents v. Tomanio,* 446 U.S. 478, 485-486 (1980); *Donoghue v. Orange County,* 848 F.2d 926, 930-931 (9th Cir. 1987)).

Generally, the statute of limitations begins running when the plaintiff is entitled to bring a suit for the wrongful conduct. (*See Osborn v. Hopkin,* 160 Cal. 501, 506 (1911)). In *Bollengier v. Doctors' Medical Center,* 222 Cal. App. 3d 1115, 1124-1127 (1990) a doctor was subjected to a "summary suspension" but had not yet concluded all of his rights to internal administrative appeals. He attempted to sue the hospital before his time to appeal administratively within the hospital had expired. The court held at 222 Cal. App. 3d 1125 that, "Here, a final decision on the merits has not been made." Therefore, the court held that the plaintiff could not yet bring his lawsuit to court. He had to wait until the administrative procedure had to run its course, *whether or not he sought to invoke that procedure.* In *Kumar v. National Medical Enterprises, Inc.,* 218 Cal. App. 3d 1050 (1990), a doctor filed suit following his suspension from staff privileges by hospital

committees. The court of appeal held that because of the pendency of the administrative proceedings the matter was not yet *final.*

The Ninth Circuit relied on *Delaware State College v. Ricks,* 449 U.S. 250 (1980), in concluding that the petitioner's statute of limitations began running with the notification of summary suspension on August 29, 1988. However, as was pointed out by the First Circuit in *Johnson v. General Elec.,* 840 F.2d 132, 134-139 (1st Cir. 1988), the *Ricks* holding did not mean that the statute of limitations begins running before the discriminatory act is final. Moreover, under *Johnson,* a cause of action for discrimination does not accrue before such finality. To hold otherwise would result in numerous lawsuits before injuries were certain. In the instant case, for example, until the suspension was *final,* no sooner than September 30, 1988, the petitioner's damages were not certain.

While the point of accrual of a federal cause of action may be governed by federal law, the question of when the petitioner knew or reasonably should have known of his right to bring the action — the point when the statute of limitations begins running — is governed by state law. *Vaughan v. Grijalva,* 927 F.2d 476, 480 (9th Cir. 1991). Here the petitioner could not know of his right to sue until the administrative proceeding had ground to a conclusion, resulting in a *final* discriminatory act. (*See Kumar v. National Medical Enterprises, Inc., supra,* 218 Cal. App. 3d at p. 1056).

This point is further illustrated by *Hoesterey v. City of Cathedral City,* 945 F.2d 317, 319-320 (9th Cir. 1991). In *Hoesterey,* the plaintiff challenged an unlawful employment practice consisting of termination while failing to provide the plaintiff with a proper pre-termination hearing. (*Id.* at 320.) The defendants argued that the cause of action accrued upon

communication of the decision to terminate. (*Ibid.*). The plaintiff argued, as does petitioner in the instant case, that the wrongful conduct consisted in the final imposition of the sanction together with the final refusal to provide the requested procedural safeguards. The Ninth Circuit adopted the petitioner's reasoning, explaining:

> Because *Hoesterey* contests the lack of process accompanying his termination, in contrast to *Ricks* . . ., simple oral notification of the decision to terminate him at a later time would not alert him to the specific practices challenged here: the fact that no more process would be forthcoming prior to termination. Thus, the simple notification that he was being discharged at a later date would not be sufficient to trigger the statute of limitations period . . . Instead, to trigger the statute of limitations, *Hoesterey* needed to have received notice, *not only of the termination decision, but also that the decision was final and that it would be followed by no further process.*

(*Ibid.;* emphasis added).

In the instant case, as in *Hoesterey, supra,* the petitioner's challenge is not merely to the decision but to the defective and improper process under which the decisions were made. Therefore, to trigger the statute of limitations, the petitioner needed to have received notice, not merely of the suspension, but also that the suspension was final and that it would be followed by no further process or hearing. That notification did not come until October 10, 1988. Under *Hoesterey, supra,* it is clear that petitioners' cause of action did not accrue until October 10, 1988.

II.

THE NINTH CIRCUIT ERRED IN UPHOLDING SUMMARY JUDGMENT BASED UPON THE EXPIRATION OF A ONE-YEAR STATUTE OF LIMITATIONS WHERE THE PETITIONER SET FORTH A SHOWING OF EQUITABLE TOLLING.

Donoghue v. Orange County, 848 F.2d 926, 930 (9th Cir. 1987) held that the California rule of equitable tolling applies in federal civil rights actions. Under that rule, a period of limitation applicable to one action is equitably tolled when an injured person having several remedies reasonably and in good faith pursues one designed to lessen the extent of the injury or damages. (*See Myers v. Orange County,* 6 Cal. App. 3d 626, 634 (1970).) The exhaustion of administrative remedies will suspend the running of a period of limitation even though no statute makes it a condition to the right to sue. (*See Campbell v. Graham-Armstrong,* 9 Cal. 3d 482-490 (1973).)

Each of the "three core elements" for equitable tolling discussed in *Donoghue* are clearly applicable in this case, As the Ninth Circuit acknowledged, (Appendix, p. 15a) as to the "two threshold requirements" — (1) consistency with federal policy and (2) remedies for distinct wrongs — two observations are in order. First, with respect to the "remedies for distinct wrongs" requirement, the discussion on *Donoghue v. Orange County, supra,* 848 F.2d at p. 931, suggests only that a careful evaluation of the wrongs sought to be remedied through further factual development may be appropriate.

The claims raised by petitioner in his complaint to the Office of Civil Rights are *not* "separate and distinct" from the claims raised against respondents in this action. It has been held that discrimination on the basis of race in the imposition of

monitoring and supervision on a physician may give rise to a private cause of action under 42 U.S.C. § 1981. (*See Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1275 (D.C. Cir. 1991).) The Ninth Circuit's analysis is premised on the assumption that § 1981 cannot reach racial discrimination in the imposition of monitoring and supervision on a physician. That assumption, however, is false. The court in *Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1275 (D.C. Cir., 1991), stated that racial discrimination in the imposition of monitoring and supervision on a physician may give rise to a private cause of action under § 1981.

Second, with respect to the Ninth Circuit's analysis that Dr. Fobbs' "has made no showing that applying the equitable tolling doctrine to his § 1981 claim would not be inconsistent with federal policy," it need only be observed that the parties moving for summary judgment did not raise that contention. Under *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the initial burden is placed on the moving party to specifically point out to the trial court an alleged absence of evidence supporting summary judgment. Once the moving party has done so, the non-moving party must designate specific facts showing that there is a genuine issue for trial. (*Id.* at 324.) In the instant case, there was no assertion by the moving party of the absence of a "threshold requirement" of consistency with federal policy. Moreover, it seems obvious that federal policy favoring non-discriminatory practices would support the application of equitable tolling in this case, to encourage immediate and prompt resort to the office of civil rights so that the facts may be properly investigated prior to resort to the courts.

III.

THE NINTH CIRCUIT ERRED IN UPHOLDING SUMMARY JUDGMENT PREMISED ON THE EXPIRATION OF A ONE-YEAR STATUTE OF LIMITATIONS WHERE THE PETITIONER SHOWED THAT THE RESPONDENTS MADE REPRESENTATIONS TO PETITIONER, RELIED UPON BY PETITIONER, THAT THE WRONGFUL ACT WOULD NOT BE COMPLETE UNTIL A TIME WITHIN ONE YEAR OF THE FILING OF THE UNDERLYING COMPLAINT.

When the conduct or the representations of a defendant induce plaintiff's delay in filing an action, the defendant may be estopped to plead the statute of limitations as a defense. (*See Carruth v. Fritch*, 36 Cal. 2d 426, 431-434 (1950).) When plaintiff's delay was induced by the defendant, that delay is not a defense, even if there was no designed fraud on the part of the defendant. (*See Ginns v. Savage,* 61 Cal. 2d 520, 524-525 (1964).) In this case, the communications from the respondent led petitioner to believe that the statute of limitations could not have begun running prior to September 30, 1988.

Furthermore, the notice given to the petitioner was not the type of unequivocal notice contemplated by *Hoesterey v. City of Cathedral City, supra*, 945 F.2d 317, 320, in situations where the plaintiff challenges not merely the decision but the unfair procedures:

> To alert Hoesterey to the accrual of his claims, this notice would need to be unequivocal, and communicated in a manner such that no reasonable person could think there might be a retreat or change in position prior to the termination of the employment

> decision. In the absence of such unequivocal notice, it would only be on the last day of employment that Hoesterey could become aware that the decision was final and that no further process could be forthcoming prior to termination. Accordingly, it would be only on this date that the statute of limitations period would begin to run.

As analyzed in *Hoesterey*, the only "unequivocal" notification sufficient to start the statute of limitations was the letter of October 10, 1988. The prior communications were equivocal and caused the petitioner to believe that no final decision had yet occurred. Having misled the petitioner with such equivocal communications, the respondents are estopped to assert that the statute began to run at any time prior to the first unequivocal notice — that of October 10, 1988.

IV.

THE NINTH CIRCUIT ERRED IN UPHOLDING SUMMARY JUDGMENT PREMISED ON THE EXPIRATION OF A ONE-YEAR STATUTE OF LIMITATIONS WHERE THE PETITIONER SHOWED A CONTINUING VIOLATION OF 42 U.S.C. § 1981, SUCH THAT THE LAST DISCRIMINATORY ACT OCCURRED WITHIN ONE YEAR OF THE FILING OF THE UNDERLYING COMPLAINT.

Petitioner established a pattern of discrimination against him via a series of related acts all done for the purpose of causing him to lose his hospital privileges. Such a "continuing violation" can be either a company-wide policy of discrimination or a series of related acts taken against a single individual. (*See Bruno v. Western Elec. Co.*, 829 F.2d 958, 961 (1987).) A series of acts

which are related because they are a part of a defendant's plan to force a plaintiff to give up his position, either voluntarily or involuntarily, has been held to constitute a continuing violation. (*Id.* at 961-962.)

When a continuing violation of the civil rights laws is established, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of the continuing violation. (*See O'Malley v. GTE Service Corp.*, 758 F.2d 818, 821 (1985).) Once having shown discrimination under a continuing violation which extends into the actionable period, the civil rights plaintiff may also recover for portions of the persistent process of illegal discrimination that antedated the limitations period. (*See Berry v. Board of Supervisors of L.S.U. Community Hospital*, 667 F.2d 788, 791-792 (1982), in which the "continuing violation" rule was specifically applied to § 1981 claims.)

The last discriminatory act did not occur until October 10, 1988. That act was the rejection of petitioner's request for fair hearing conditions, and that rejection constituted a discriminatory act of which petitioner complains. Therefore, the continuing violation rule applies and the date of accrual should have been found to be October 10, 1988. The allegation of a continuing course of intimidation, harassment, and disparate treatment of an individual has been held to adequately allege a continuing violation. (*Sosa v. Hiraoka*, 920 F.2d 1451, 1457-1458 (9th Cir. 1990).)

V.

THE NINTH CIRCUIT ERRED IN UPHOLDING SUMMARY JUDGMENT BASED UPON THE HEALTH CARE QUALITY IMPROVEMENT ACT WHERE THE PETITIONER PRODUCED EVIDENCE OF NO IMMINENT HARM WHILE THE RESPONDENT FAILED TO PRODUCE EVIDENCE OF IMMINENT HARM, AND WHERE THE NINTH CIRCUIT BASED ITS DECISION ON THE INSISTENCE OF A MERE "POSSIBILITY" OF HARM SUPPORTING A SUMMARY ACTION.

The Health Care Quality Improvement Act of 1986 only permits summary action "subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual." (42 U.S.C. § 11112(c)(2).) The Ninth Circuit discounts this requirement of the Health Care Quality Improvement Act of 1986 by noting that the statute:

> . . . does not require imminent danger to exist before a summary restraint is imposed. It only requires that the danger *may* result if the restraint is not imposed.

(Appendix, p. 9a).

If that observation of the Ninth Circuit is intended to suggest that summary action may be taken even in the complete absence of any evidence of imminent danger to the health of any individual, merely because there *may* be such a danger in the future, then the Ninth Circuit has completely eliminated all protections for all doctors from summary restrictions of privileges. Literally in any case of medical care, where that care is questioned, someone could hypothesize a scenario in which "imminent danger" might result to some individual *in the future*.

The point is that in literally every case of medical treatment — or the failure to treat — there *"may"* at some point in the indeterminate future be "imminent danger" to some individual. Under the Ninth Circuit's interpretation of the statute, hospitals and peer review committees will have no incentive to *ever* provide a physician with notice and hearing procedures before subjecting the physician to privilege restrictions. Because it is always *possible* to conjure up hypothetical scenarios involving possible future "imminent danger," hospitals and committees may with complete immunity restrict the privileges of physicians before giving them any notice or hearing procedures. Such action could *always* be justified on the theory that there "may" — at some time in the indefinite future — be imminent danger to some individual, and that is all that is required under the Ninth Circuit's analysis.

The evils of such a statutory construction are profound. First, it is a fact of life that a physician who has been summarily restricted is placed on the defensive through the remainder of peer review proceedings. All subsequent panels and hearing officers cannot avoid the knowledge that some previous committee has *already restricted the physician's privileges.* In this very case, petitioner suffered that precise prejudice. Panelists were of the view that subsequent hearing committees were to decide *not* the merits of the case against petitioner, but merely whether the original summary restriction was appropriate. Thus, Dr. Meltvedt informed the first judicial review panel that its duty was merely to determine whether "the imposition of the monitoring was reasonable and warranted at that time," referring to the summary monitoring. Similarly, Dr. Bergmann stated that she understood "merely that we are to decide whether the decision that was rendered by the Executive Committee was appropriate or not," in imposing the summary monitoring.

Second, the Ninth Circuit's interpretation of the statute

effectively strips physicians of *all* due process protections. Since it is true that in every case some committee could conceive of some circumstances which "may" suggest imminent danger to some patient in the future, it follows that in every case a committee could impose summary restrictions on the physician with complete immunity. All the committee would have to do was restrict the physician, then *subsequently* offer notice and a hearing. The physician thus loses his privileges, and then must attempt to convince subsequent committees to reinstate those privileges. Panels have therefore received the right to engage in anti-competitive conduct with complete immunity. Since none of the prior hearing requirements apply, groups of direct competitors may actually put their competition *out of business* without a hearing — asserting in every case that there "may" be imminent danger.

Third, under the Ninth Circuit's interpretation of the statute, the physician is not even permitted to challenge the committee determination of "imminent danger," even though the only evidence bearing on the point establishes that there was *no* potential for imminent danger. Thus, the physician is also deprived of his right to a trial in a case in which there is a legitimate factual dispute as to whether or not there was any basis for a determination of potential imminent danger. In the instant case, Dr. Cooke testified that there were no health emergencies to justify the summary restriction of petitioner's privileges on June 23, 1987, and Drs. Cooke and LeCroix submitted declarations establishing that on or about June 23, 1987, petitioner's standard of care did *not* pose an imminent or foreseeable future threat to patient well being. Drs. Cooke and LeCroix expressly stated that the summary restrictions were inappropriate.

In a case where the petitioner has produced evidence of no potential imminent danger, and the respondent has produce no evidence establishing imminent danger, to affirm a grant of

summary judgment on the theory that the statutory word "may" allows peer review committees to side-step the "imminent danger" requirement, runs counter to fact and law and effectively rewrites the statute. The Congress might just as well have eliminated the whole "imminent danger" clause from the statute and allowed summary restrictions at the will of the peer review committees, based upon the Ninth Circuit's construction of the statute. The Ninth Circuit has unquestionably ignored the word "imminent." The Ninth Circuit therefore has overlooked the factual development of this case as well as the congressional choice of language in the statute. Contrary to both, the Ninth Circuit has allowed peer review committees to impose summary restrictions without any evidence of actual or potential imminent danger, thus depriving all physicians of any semblance of due process before they lose their privileges.

The Ninth Circuit's opinion seemingly concedes as much. While there is generic reference to "problems caused by Dr. Fobbs," there is no reference in the opinion to *any evidence of patient harm, threat to a patient, or actual or potential imminent danger,* present, past, or future. (Appendix, pp. 7a-10a). Thus, in addition to overlooking the foregoing factual and legal issues, the opinion is defective in overlooking the express evidence through Drs. Cooke and LeCroix of *no* potential imminent danger, and *no* justification for the summary restrictions. To uphold summary judgment on such a record is contrary to the notion that summary judgment is only appropriate where the non-movant cannot raise a triable issue of fact. Here, petitioner not only raised a triable issue of fact, but was the only party producing any evidence on the issue, and petitioner's evidence established that there was no actual or potential imminent danger by reason of petitioner's practices.

VI.

THE NINTH CIRCUIT ERRED IN UPHOLDING SUMMARY JUDGMENT BASED UPON THE HEALTH CARE QUALITY IMPROVEMENT ACT WHERE THE PETITIONER HAS SHOWN DEVIATION FROM THE HEALTH CARE QUALITY IMPROVEMENT ACT STANDARDS AS TO PEER REVIEW ACTIONS PRIOR TO THE FINAL PEER REVIEW ACTION.

The Ninth Circuit in this case, following the lead of the trial judge, only considered the first and last hearing in assessing whether the HCQIA requirements had been met. There is no discussion in the Ninth Circuit's opinion concerning any peer review actions other than the initial summary restriction. By its affirmance of the trial judge's written opinion, it is inferable that the Ninth Circuit agreed with the trial judge that only the first and last peer review action was to be evaluated. The trial judge completely ignored all the intermediate peer review actions and hearings which were admittedly defective. The trial judge addressed one of appellant's arguments — that the HCQIA standards should apply to all *conduct* of the peer review system. (Appendix, pp. 50a-52a). The trial judge rejected petitioner's contention that the HCQIA standards must be met by the professional review activity taken as a whole; the trial judge instead decided that the HCQIA requirements and immunity applied to "discrete professional review actions/decisions." (*Ibid.*). The Ninth Circuit, in adopting the trial judge's decision, apparently adopted that conclusion.

However, the Ninth Circuit conspicuously overlooked the most significant contention advanced by Dr. Fobbs in this appeal. That contention is not addressed in the trial judge's opinion either. That contention is that even if the HDQIA immunity requirements apply to discrete actions/decisions, in the context of

the instant case that means that such requirements must be applied to all of the intermediate evidentiary hearings — not merely the initial summary restriction and the final hearing (or non-hearing) in the case. The evidentiary hearings resulted in decisions — professional review actions — by judicial review committees.

In the instant case, there were approximately seven distinct peer review hearings/actions to which the HCQIA standards should have been applied. Both the Ninth Circuit and the trial court ignored approximately five of those actions. As stated by petitioner in his opening brief:

> At a minimum, the HCQIA standards must applied to all of the hearings and all of the summary actions in this case. Thus, the standards must be applied to the July 23, 1987 action, the hearings of September 15, 1987, and September 24, 1987, and the hearing of January 25, 1988, in addition to the hearing scheduled for August, 1988. The act was designed to apply to all evidentiary hearings. To ignore the intermediate hearings would be to countenance months, or even years, of improper anti-competitive conduct provided only that the *last* of a series of hearings complied with the HCQIA standards.

(Brief of Appellant, p. 39).

Petitioner was subjected to defective peer review "discrete" actions/hearings on, and in decisions resulting from hearings on September 15, 1987, September 24, 1987, and January 25, 1988; petitioner had to pursue two appeals related to those actions/ decisions. (Appendix, pp. 29a-33a). As a result of those defective

hearings, peer review "actions" were taken. (*Ibid.*). Those hearings — at least the hearings of September, 1987 and January, 1988 — were *admittedly* defective. It was because of those defects that the board of trustees on administrative appeal granted further hearings. (*Ibid.*). Both the Ninth Circuit and the trial judge have completely ignored those defective "discrete" actions.

Ignoring the defective intermediate hearings and decisions will produce mischief and evil in peer review. Hospitals and committees now have the complete right — with immunity — to subject a physician to an unending series of defective hearings until the physician exhausts his resources in fighting the peer review. When the physician finally gives up, the hospital can hide behind his withdrawal from the proceedings as an excuse for non-compliance with HCQIA standards, and can obtain immunity for itself and for *all* peer review committee members, including members of earlier defective panels. This issue was specifically proffered not only in the brief of appellant, but also in the reply brief of appellant, at pages 17-22.

By omitting to consider the application of the HCQIA to the admittedly defective hearings of September, 1987 and January, 1988, and decisions resulting therefrom, the Ninth Circuit has created a conflict with its prior decision in *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992). The hearings of September 15, 1987, September 24, 1987, and January 25, 1988 were admittedly defective due to failure to permit voir dire of panel members and other defects. *Austin v. McNamara* held that the type of professional review action which is addressed by the HCQIA is an action or recommendation which affects (or may affect) adversely the clinical privileges, or membership of a professional society, of the physician. (*Id.* at 730.)

That definition would encompass all of the hearings and resulting decisions in this case. Thus, HCQIA standards,

according to *Austin*, must be applied not merely to the June 23, 1987 action, but also to the hearings of September 15, 1987, September 24, 1987, and January 25, 1988, and the decisions resulting from those hearings. By failing to apply HCQIA standards to those hearings and decisions, the decision in this case is in direct conflict with the decision in *Austin*, in which the propriety of previous hearings was considered, even though the physician in *Austin* received an admittedly proper final hearing.

CONCLUSION

For the reasons herein stated, this petition for writ of certiorari should be granted. The decision of the Ninth Circuit should be reversed as to the issues set forth in this petition.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 2, 1994

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-15852

D.C. NO. CVF 89-682 REC

DENARD M. FOBBS, M.D.

Plaintiff-Appellant,

v.

HOLY CROSS HEALTH SYSTEM CORPORATION, a California corporation, doing business as SAINT AGNES HOSPITAL and MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; LARRY E. NIX,

Defendants-Appellees.

Before: FLETCHER, FERGUSON, and TROTT, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing. Judges Fletcher and Trott have voted to reject the suggestions for rehearing en banc. Judge Ferguson, being a senior judge, cannot vote on the en banc suggestion.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 19, 1994

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DENARD M. FOBBS, M.D.,
Plaintiff-Appellant,

v.

HOLY CROSS HEALTH SYSTEM CORPORATION, a California corporation, doing business as SAINT AGNES HOSPITAL and MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; LARRY E. NIX,
Defendants-Appellees.

No. 92-15852
D.C. No.
CV 89-682 REC
OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Argued and Submitted
April 12, 1994—San Francisco, California

Appendix B

Filed July 19, 1994

Before: Betty B. Fletcher, Warren J. Ferguson, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Ferguson

SUMMARY

Individual Rights/Civil Rights/Minorities

The court of appeals affirmed in part a district court judgment and reversed in part. The court held that the running of the applicable statute of limitations should not be tolled during the period in which the Office for Civil Rights (OCR) investigated a civil rights plaintiff's race discrimination claim.

Appellant Denard M. Fobbs, M.D., an African American, was granted privileges by appellee St. Agnes Hospital and Medical Center to perform intra-abdominal laser surgery. After questions were raised as to possible irregularities with respect to three of Fobbs' laser surgery cases, a doctor concluded that there were difficulties relating to responsibilities of both Fobbs and hospital employees. The Hospital's Supervisory Committee recommended to the Medical Executive Committee (MEC) that monitoring be imposed, and monitoring restrictions were summarily imposed. The Hospital summarily suspended Fobbs' laser surgery privileges.

Over a year after receiving notification of the MEC's decision to summarily suspend him, Fobbs sued appellee Holy Cross Health Systems Corp., its subsidiary the Hospital, and appellee individual physicians, alleging violations of the Sherman Antitrust Act, 42 U.S.C. § 1981, 42 U.S.C. § 1985(3),

and Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d). Fobbs alleged race discrimination.

The district court granted the physicians' motion to dismiss the § 1985 claim. The court granted the Hospital's motion to dismiss the Title VI claim against the Hospital on the ground that Fobbs did not sufficiently allege that he suffered racial discrimination, that he had third party standing, or that the suspension of his privileges necessarily caused discrimination against patients. The court granted the physicians' motion for partial summary judgment as to the § 1981 claim on the basis that it was time-barred. The court granted summary judgment in favor of all defendants on the Sherman Act claim, holding that the defendants were immune from federal antitrust liability by virtue of the provisions of the Health Care Quality Improvement Act of 1986 (HCQIA). Fobbs appealed.

[1] A review committee may immediately suspend or restrict clinical privileges, subject to subsequent notice and hearing, where the failure to take such an action may result in "imminent danger" to a person's health. [2] The record of the problems caused by Fobbs clearly supported the conclusion of the MEC that a summary restriction be taken to avoid imminent danger. The defendants had ample medical justification to take the steps. Thus, the district court correctly granted the defendants HCQIA immunity with respect to the summary monitoring restrictions.

[3] Fobbs' § 1981 claim was subject to California's one-year statute of limitations applicable to personal injury actions. [4] Fobbs' contention that his claim did not accrue when the MEC notified him that his hospital privileges were being summarily suspended had to fail. [5] In addition, Fobbs failed to meet the threshold requirements to benefit from California's equitable tolling doctrine. Thus, the running of the

statute of limitations could not be tolled during the period in which the OCR investigated Fobbs' claim. [6] Congress has not proscribed civil rights plaintiffs from filing § 1981 actions while an OCR investigation is pending; furthermore, Fobbs made only a conclusory showing that the OCR procedures and his § 1981 claim were designed to address the same wrongs and grant the same remedies.

[7] There is no requirement that a § 2000(d) plaintiff plead that he was an intended beneficiary of the federally funded program in which the defendants are alleged to have participated. [8] Fobbs stated a Title VI claim under the theory that the Hospital received federal funds and impermissibly discriminated against him based on race. [9] However, Fobbs failed to state a claim under the theory that he was an intended beneficiary of funding designed to improve health care for his patients. [10] Finally, Fobbs' allegations of discrimination against his patients were not valid.

[11] In his § 1985(3) claim, Fobbs alleged that the defendants entered into a conspiracy, the purpose of which was to deprive him and his minority patients of equal protection of the laws based on their race. [12] In support of the conspiracy allegation, Fobbs pled that overt acts were done in furtherance of the conspiracy, including attempts to limit his surgical privileges at the Hospital. [13] Fobbs' theories of discrimination, coupled with his catalog of the defendants' allegedly discriminatorily motivated overt acts, gave the defendants fair notice as to the specific acts which Fobbs contended demonstrated a conspiracy to interfere with his right and privilege to practice medicine based on his race and on the race of his patients. [14] However, Fobbs did not have standing to sue under § 1985 on behalf of his patients, where he sought money damages. [15] Because Fobbs stated a colorable claim of conspiracy, the district court's dismissal of his § 1985(3) claim was reversed in part.

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COUNSEL

James F. Tritt, Tritt and Tritt, Fresno, California, and Jacob M. Weisberg, Fresno, California, for the plaintiff-appellant.

David H. Bent, McCormick, Barstow, Sheppard, Wayte & Carruth, Fresno, California, for defendants-appellees, Holy Cross Health System Corp., and Saint Agnes Medical Center.

J. Robert Liset, Musick, Peeler & Garrett, Los Angeles, California, for Physician defendants.

OPINION

FERGUSON, Circuit Judge:

Plaintiff Denard M. Fobbs, M.D. seeks judgment against defendant St. Agnes Hospital and Medical Center ("St. Agnes" or "hospital") and various individual physician defendants who were on the Medical Staff and served on various peer review committees at the hospital for the summary suspension of his staff privileges.

In 1987, Dr. Fobbs, an African American, was granted privileges by the hospital to perform intra-abdominal laser surgery as a member of the Department of Obstetrics-Gynecology/Perinatology. After the hospital summarily suspended these privileges on September 29, 1989, Dr. Fobbs filed a complaint against defendant Holy Cross Health Systems Corporation, its subsidiary Saint Agnes Hospital, and twenty-seven individual defendant physicians.

After a series of motions and amendments, Dr. Fobbs' second amended complaint consisted of various allegations involving civil rights and antitrust violations.

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This appeal involves the following specific claims in that complaint: the first claim pursuant to the Sherman Antitrust Act, 15 U.S.C. § 2; the second claim pursuant to 42 U.S.C. § 1981; the third claim pursuant to Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, against Saint Agnes Hospital only; and the fourth claim pursuant to 42 U.S.C. § 1985(3).

On August 20, 1990, the district court granted the physician defendants' motion to dismiss the § 1985 claim and granted the hospital's motion to dismiss the Title VI claim.

On November 25, 1990, the court granted physician defendants' motion for partial summary judgment as to the § 1981 claim on the basis that it was time-barred.

On March 17, 1992, the court granted summary judgment in favor of all defendants on the Sherman Antitrust Act claim, holding that they were immune from federal antitrust liability by virtue of the provisions of the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101, *et seq.*

I. *DISCUSSION*

A. *Sherman Antitrust Act Claim*

The district court has published its order granting defendants' motion for summary judgment on the Sherman Antitrust Act claim. *Fobbs v. Holy Cross Health System Corp., et al.*, 789 F. Supp. 1054 (E.D. Cal. 1992).

We affirm the district court's order with the following addition to its opinion, which affects section V.A.3. set forth on pages 1067 and 1068 relating to whether the summary monitoring restraints prior to any notice or hearing violated the HCQIA.

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[1] A review committee may immediately suspend or restrict clinical privileges "subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual." 42 U.S.C. § 11112(c)(2). We agree that the summary restrictions of Dr. Fobbs' clinical privileges by means of the monitoring requirements meet the requirements of § 11112(c)(2).

Dr. Fobbs was the only physician in the Central Valley of California at the time performing laser surgery in obstetrics cases. After he performed a few such surgeries, questions were raised by the defendants as to possible irregularities with respect to three cases. The Supervisory Committee at the hospital invited Dr. Fobbs to discuss these cases. As a result of this meeting, copies of the case charts were sent for analysis and review to Dr. Donald R. Ostergard, Professor of Obstetrics and Gynecology at the University of California, Irvine, who was a former teacher of Dr. Fobbs.

Dr. Ostergard submitted a response in which he concluded that there were difficulties relating to responsibilities of both Dr. Fobbs and hospital employees. In the first case, there was improper functioning of the laser equipment. In that case, Dr. Ostergard criticized the hospital nursing staff for failing to calibrate the laser equipment before the surgery and failing to notify Dr. Fobbs of the equipment malfunction. He also concluded, however, that Dr. Fobbs used poor judgment in leaving the laser patient under anesthesia to deliver another obstetrical patient. In the second case, he concluded that Dr. Fobbs performed an unnecessary dilatation and curettage. Regarding the third patient, Dr. Ostergard reported that there was a lack of judgment on Dr. Fobbs' part in performing vaporization of endometriosis. Finally, he reported that these patients did not have a written or dictated history and physical examination on their charts at the time of the laser procedures.

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Shortly after Dr. Ostergard's report was received, Dr. Fobbs wrote to the hospital, setting forth a conversation he had with Dr. Ostergard and claiming that he had done no wrong. The Supervisory Committee recommended to the Medical Executive Committee ("MEC") that monitoring be imposed. The following monitoring restrictions were then summarily imposed:

> (1) Plaintiff was to have a second opinion on every admission to St. Agnes Medical Center;
>
> (2) This was to include a history and physical examination by the monitor;
>
> (3) On any surgical procedures, the monitor was to be present during the operation;
>
> (4) The follow-up care of the patient was to be shared with the monitor; and
>
> (5) The monitors were to be members of the Ob-Gyn/Perinatology Supervisory Committee.

Dr. Fobbs contends that the statute requires that there be "imminent danger to the health of any individual" before there may be a summary restriction. However, the statute does not require imminent danger to exist before a summary restraint is imposed. It only requires that the danger *may* result if the restraint is not imposed.

[2] The record of the problems caused by Dr. Fobbs clearly supports the conclusion of the MEC that a summary restriction be taken to avoid imminent danger. Dr. Fobbs was not suspended, his practice was not limited, and his access to the hospital was not limited. The monitoring conditions were nec-

essary in light of the past history of Dr. Fobbs and his laser surgery. The defendants had ample medical justification to take the steps. The district court correctly granted defendants HCQIA immunity with respect to the summary monitoring restrictions.

We address in more detail the three other claims of Dr. Fobbs' complaint as they are not included in the published opinion of the district court.

B. *42 U.S.C. § 1981 Claim*

Dr. Fobbs alleges that defendants deprived him of his rights under 42 U.S.C. § 1981, which confers upon "[a]ll persons . . . the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens," in suspending his staff privilege without just cause or due process.

[3] The MEC decided to summarily suspend Dr. Fobbs on August 26, 1987. Dr. Fobbs received notification on August 29, 1987. He did not file suit until September 29, 1988, over a year after receiving notification. Dr. Fobbs concedes that his § 1981 claim is subject to California Code of Civil Procedure § 340(3), California's one-year statute of limitations applicable to personal injury actions. He presents four theories, however, which he contends preserve his claim. We conclude that these theories are inadequate to save his claim.

1. *Date When Claim Accrued*

Dr. Fobbs contends that he is not precluded from bringing suit on this claim because the statute did not begin to run until September 30, 1988, the date on which he contends defendants' improper action became final. In the alternative, he argues the statutory period began October 10, 1988, the date

of defendants' letter allegedly formalizing his suspension and denying his request for fair hearing conditions, which he contends was the last manifestation of defendants' allegedly continuing violation of § 1981.

"[A]lthough states' statutes of limitation apply [to § 1981 claims], federal law governs when the claim accrues and the limitation period begins to run." *Chung v. Pomona Valley Community Hosp.*, 667 F.2d 788, 791 (9th Cir. 1982) (citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947)).

This case is governed by *Delaware State College v. Ricks*, 449 U.S. 250 (1980), in which the Supreme Court rejected a claim similar to Dr. Fobbs'. In *Ricks*, plaintiff filed suit under Title VII and 42 U.S.C. § 1981 against his employer, Delaware State College, after it denied him tenure. He then filed a grievance pursuant to internal administrative policy with the college Board of Trustees. Six months later, the Board notified Ricks that it denied his grievance.

Ricks contended that because he was granted a one-year "terminal" contract after being denied tenure, the applicable statute of limitation did not begin to run until the expiration of the contract. The Court rejected this argument, concluding that Ricks' claim accrued the date the tenure decision was made and defendants notified Ricks. *Id.* at 259-60.

The Court also considered *amicus curiae* EEOC's argument that the statute of limitation did not begin to run until the Board of Trustees denied Ricks' grievance. The EEOC argued that the Trustees' initial decision to deny Ricks tenure was "only an expression of intent that did not become final until the grievance was denied." *Id.* at 260. The Court rejected this argument, stating that "entertaining a grievance complaining of the tenure decision does not suggest that the earlier

decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Id.* at 261 (emphasis in original).

[4] Thus, Dr. Fobbs' contention that his claim did not accrue when the St. Agnes MEC notified him that his hospital privileges were being summarily suspended must fail.

2. *California's Equitable Tolling Doctrines*

Dr. Fobbs invokes California's equitable tolling doctrines to make two related contentions. First, he contends that this court should apply California's equitable tolling rule to the period during which he pursued his claim through the Office for Civil Rights ("OCR"), September 1988 to September 1989, because "he pursued in good faith a legal remedy designed to lessen the extent of his injury or damages." Second, Dr. Fobbs contends that the limitations period for his civil action was tolled during the time consumed by the internal hospital administrative proceedings "because during that period [he was] legally prevented from taking any action to protect his rights."

California's doctrine of equitable tolling allows a plaintiff to toll the state statute of limitations "when a person has 'several formal legal remedies and reasonably and in good faith pursues one.' " *Donoghue v. Orange County*, 848 F.2d 926, 930 (9th Cir. 1987) (quoting *Jones v. Tracy School Dist.*, 27 Cal. 3d 99, 108, 611 P.2d 441, 445 (1980)). "The equitable tolling 'rule is not predicated upon the necessity of the completion of the one remedy as a prerequisite to the pursuit of the other.' " *Id.* (quoting *Myers v. Orange County*, 6 Cal. App. 3d 626, 635, 86 Cal. Rptr. 198, 203 (1970)). "The doctrine suspends the statute of limitations pending exhaustion of

administrative remedies, even though no statute makes exhaustion a condition of the right to sue." *Id.* at 931.

There are three threshold matters plaintiff must overcome before he may benefit from California's equitable tolling doctrine. First, the tolling doctrines must not be "inconsistent with federal policy underlying the cause of action under consideration." *Id.* at 930 (citing *Chardon v. Fumero Soto*, 462 U.S. 650, 657 (1983)). *See also Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980) (§ 1981 action).

Second, where "plaintiff has pursued a remedy as to only one of several distinct wrongs," the equitable tolling doctrine does not apply to those other wrongs. *Donoghue*, 848 F.2d at 931 (citing *Arnold v. United States*, 816 F.2d 1306, 1312 (9th Cir. 1987)).

Finally, California law requires that a plaintiff fulfill three "core elements," that: (1) he gave timely notice to the defendant in filing the first claim; (2) defendant is not prejudiced in gathering evidence to defend against the second claim; and (3) plaintiff acted in good faith and with reasonable conduct in filing the second claim. *Id.* (citing *Collier v. City of Pasadena*, 142 Cal. App. 3d 917, 924, 191 Cal. Rptr. 681, 684-85 (1983)).

a. *Tolling Effect of the Pending Office for Civil Rights Inquiry*

[5] As discussed below, Dr. Fobbs fails to meet the threshold requirements to benefit from the equitable tolling doctrine. Thus, the running of the statute of limitations should not

be tolled from September 1988 to September 1989, the period during which the OCR investigated Dr. Fobbs' claim.

1. *Inconsistency with Federal Policy*

Dr. Fobbs has made no showing that applying the equitable tolling doctrine to his § 1981 claim would not be inconsistent with federal policy.

2. *Remedies for Distinct Wrongs*

Dr. Fobbs argues that his Title VI grievance through the OCR addresses the same wrongs as his § 1981 claim in federal court because in both cases, he seeks to show that defendants have discriminated against him on the basis of his race by imposing monitoring and supervision requirements on him. *See Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1275 (D.C. Cir. 1991).

This issue is governed by *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). In *Railway Express Agency*, plaintiff filed charges with the EEOC, which over three years later notified him that he had a right to institute a Title VII civil action against his employer. In addition to his timely filed Title VII action, plaintiff also alleged violation of 42 U.S.C. § 1981. The Court held that plaintiff's § 1981 action was time-barred, even though plaintiff delayed bringing the § 1981 suit because he was waiting in good faith for the EEOC's recommendation.

The Court concluded that "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." The court added that it would not, "in the face of congressional emphasis upon the existence and indepen-

dence of the two remedies, . . . infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a § 1981 action while an EEOC claim is pending." *Id.* at 461.

[6] The same reasoning applies to this case. Dr. Fobbs pursued his claim with the OCR. Congress has not proscribed civil rights plaintiffs from filing § 1981 actions while an OCR investigation is pending. Furthermore, Dr. Fobbs has made only a conclusory showing, insufficient under *Railway Express Agency*, that the OCR procedures and his § 1981 claim were designed to address the same wrongs and grant the same remedies. *See Chambers v. Omaha Public School Dist.*, 536 F.2d 222, 230-31 (8th Cir. 1976) ("The remedies available under Title VI of the Civil Rights Act of 1964 on the one hand, and § 1981 and § 1983 on the other, are completely separate and independent.").

3. *California's Three "Core Elements"*

Dr. Fobbs has arguably met the three core elements required under California law. Nonetheless, because he fails to meet the first two threshold requirements, he is not entitled to toll the statute of limitation based on the pendency of his complaint before the OCR.

b. *Tolling Effect of the Internal Review Process*

Dr. Fobbs contends that he was required to complete his internal administrative remedies before he could initiate the instant civil suit. The Supreme Court has expressly rejected this argument. In *Delaware State College v. Ricks*, the EEOC argued as a fallback position that "even if the Board's first decision expressed its official position, . . . the pendency of

the grievance should toll the running of the limitations periods." 449 U.S. at 260-61. The Court summarily rejected this argument, stating, "we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." *Id.* at 261 (citing *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976)). Similarly, Dr. Fobbs argues that the running of the statute of limitation should be tolled during the period beginning August 29, 1987, the date he was notified of the suspension, and October 10, 1987, the date the MEC informed him that it would not conduct a hearing pursuant to his conditions. This contention fails under *Ricks*.

3. *Presence of a Continuing Violation*

Dr. Fobbs contends that he has alleged a continuing course of intimidation, harassment and disparate treatment culminating in defendants' October 10, 1988 finalization of his suspension and denial of his request for a fair hearing.

As defendants point out, however, beyond his conclusory allegation that the hearing procedure would have been "unfair," Dr. Fobbs has not alleged that "after August 26, 1988, he was treated differently than other Medical Staff members." Furthermore, Dr. Fobbs has not distinguished his case from *London v. Coopers & Lybrand*, where this court stated that "the natural effects of the allegedly discriminatory act are not regarded as 'continuing.' " 644 F.2d 811, 816 (9th Cir. 1981). Finally, Dr. Fobbs fails to show how defendants discriminated against him by adhering to St. Agnes bylaws in conducting their hearings and review process.

Thus, assuming there was a continuing violation, it ended on August 26, 1988, the date of Dr. Fobbs' summary suspension.

4. *Applicability of Estoppel Doctrine*

Finally, Dr. Fobbs contends that defendants should be estopped from invoking the statute of limitations as a defense, because Dr. Fobbs reasonably relied on defendants' communications, which led him to believe that the statute of limitations could not have begun to run until September 30, 1988. We disagree.

The district court found that the letter of MEC Chairman Dr. V. Roy Smith was neither fraudulent nor misleading and could not be construed as inducing Dr. Fobbs to refrain from bringing his action. The letter made no assertion regarding the statute of limitations nor when his possible legal actions would accrue. Furthermore, it is abundantly clear from the record that Dr. Fobbs did not believe anything the defendants wrote or said to him, and he certainly was not misled.

C. *Title VI Claim*

Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, provides in pertinent part that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial aid."

The district court dismissed Dr. Fobbs' Title VI claim against defendant St. Agnes on the ground that Dr. Fobbs did not sufficiently allege that he suffered racial discrimination,

that he has third party standing, or that the suspension of his privileges necessarily causes discrimination against patients. This court reviews a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir.), *cert. denied*, 113 S. Ct. 655 (1992). We reverse.

1. *Pleading Requirements*

Dr. Fobbs contends that the district court erred in requiring him to plead that he was the intended beneficiary of a federally funded program in order to state a claim under 42 U.S.C. § 2000(d).

The district court incorrectly relied on *Doe on behalf of Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 420 (7th Cir. 1986), for the proposition that 42 U.S.C. § 2000(d) requires Dr. Fobbs to plead that he is the intended beneficiary of a federally funded program at St. Agnes. *St. Joseph's Hospital* is distinguishable because plaintiff in that case expressly argued that she *did not have to be a direct beneficiary* in order to assert a claim under § 2000(d). *Id.* Rather, she contended that the court should construe the Health and Human Services regulations to grant her a private cause of action. *Id.* Thus, *St. Joseph's Hospital* is completely inapposite to the case at hand.

To state a claim for damages under 42 U.S.C. § 2000(d), *et seq.*, a plaintiff must allege that (1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal financial assistance. *Wrenn v. Kansas*, 561 F. Supp. 1216, 1221 (D.C. Kan. 1983) (citing *Jackson v. Conway*, 476 F. Supp. 896, 903 (E.D. Mo. 1979)). Although the plaintiff must prove intent at trial, it need not be pled in the complaint. *Wrenn*, 561 F. Supp. at 1221. *Compare Jackson*,

476 F. Supp. at 903 (no proof of intent is required if plaintiff seeks only injunctive relief).

[7] There is no requirement that plaintiff plead that he was an intended beneficiary of the federally funded program in which defendants are alleged to have participated. *Wrenn*, 561 F. Supp. at 1221. *Cf. Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1234-35 (7th Cir. 1980) (In reviewing complaint under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which is modeled after and enforced in the same manner as 42 U.S.C. § 2000(d), court should not define program, and therefore identify its intended beneficiaries, in a "very narrow fashion."); *Byers v. Rockford Mass Transit Dist.*, 635 F. Supp. 1387, 1390 (N.D. Ill. 1986) ("As long as some federal funding is alleged [in § 504 actions] . . . , the program specificity issue is more properly the subject of a summary judgment motion.").

2. *Sufficiency of Dr. Fobbs' Intended Beneficiary Allegation*

[8] Dr. Fobbs appears to set forth three theories for recovery under § 2000(d). Dr. Fobbs' first theory is that St. Agnes receives federal funds, and that it has impermissibly discriminated against him based on his race. As discussed above, this states a Title VI claim under *Wrenn*.

[9] Dr. Fobbs' second theory is that he is an intended beneficiary of funding designed to improve health care for his patients. He argues that because defendants discriminated against his patients on the basis of their race by discouraging people of color from obtaining medical services at St. Agnes, defendants impermissibly decreased Dr. Fobbs' ability to exercise his profession at St. Agnes. Under this theory, Dr. Fobbs is essentially only an *incidental* beneficiary of pro-

grams designed to benefit his patients, and is trying to manipulate his status as an incidental beneficiary into that of a primary or intended beneficiary. Thus, Dr. Fobbs fails to state a claim under this theory.

Finally, Dr. Fobbs alleges that he is asserting his patients' and his potential patients' rights on their behalf. Like physician Doe in *St. Joseph's Hospital*, Dr. Fobbs seeks to represent his patients on the grounds that "discrimination against doctors imports discrimination against their patients (presumably the primary beneficiaries here)." 788 F.2d at 421. Dr. Fobbs alleges that his patients are intended beneficiaries of St. Agnes' federally funded programs, and that the hospital encourages doctors who do not take Medi-Cal or other uninsured patients to obtain and maintain staff privileges, while it discourages doctors who would admit Medi-Cal or uninsured patients into St. Agnes from obtaining and maintaining medical staff privileges. He alleges that a large percentage of these Medi-Cal and uninsured patients are minorities, and thus, St. Agnes' policy:

> has the impact of restricting the amount of minority patients who utilize [St. Agnes]. . . . It is alleged that Plaintiff Dr. FOBBS' patients and potential patients, approximately 60% of whom are members of a minority race will not be able to find a physician willing to admit them to [St. Agnes] because of the policies and practices complained of herein.

In *St. Joseph's Hospital*, the Seventh Circuit held that physician Doe did not establish third party standing to assert the rights of her patients, even where Doe's complaint invoked "the doctor/patient relationship and the obstacle to the patient raising their [sic] own rights (including their lack of resources and the uncertainty as to whether and when they might need hospitalization)." 788 F.2d at 421, n.18.

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Dr. Fobbs seeks to distinguish *St. Joseph's Hospital* on the ground that unlike Doe, Dr. Fobbs alleged that other physicians at St. Agnes could not admit his patients to St. Agnes, and that therefore, his patients cannot gain access to St. Agnes without Dr. Fobbs, or at the least, his patients are burdened in that they "will have more difficulty in securing admission to the hospital than will other patients."

We reject this theory for two reasons. First, Dr. Fobbs conceded to the district court that other doctors at St. Agnes may admit his patients and that St. Agnes does not totally exclude minority patients. Second, Dr. Fobbs has not explained why *he*, rather than his patients, should receive money damages for injury inflicted on his patients.[1] *See United States General, Inc. v. City of Joliet*, 432 F. Supp. 346, 351 (N.D. Ill. 1977) ("[I]f [low income housing developer] plaintiff prevailed on the merits, it would obtain damages for itself and the minority group families would receive no benefit . . . . [P]laintiff lacks standing to bring this action solely as a result of the indirect relationship between it and the minority group families.").

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[1] The district court specifically questioned Dr. Fobbs' attorney on this point:

> THE COURT: "How is [Dr. Fobbs] entitled to collect anything for his patients being discriminated against? Because he loses money?"
>
> MR. WEISBERG: "Well, certainly there is the allegation that he has lost substantial amounts of money as a result of having lost his privileges."
>
> THE COURT: "No, now you are changing the subject on me again. You said he wants money because he didn't collect money because his patients couldn't go to that hospital."
>
> MR. WEISBERG: "That's correct."

Reporter's Transcript May 7, 1990, p.11.

[10] We hold that Dr. Fobbs in his Title VI claim has sufficiently alleged personal racial discrimination, and the dismissal of the district court on that issue is reversed. However, his allegations of third party standing and discrimination against his patients are not valid, and the holding of the district court on those issues is affirmed.

D. *42 U.S.C. § 1985(3) Claim*

42 U.S.C. § 1985(3) provides a cause of action for damages where "two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . ."

The primary issue of this claim is whether a heightened pleading standard for civil rights cases as set forth in *Frazier v. Southeastern Pa. Transp. Auth.*, 785 F.2d 65 (3d Cir. 1986), is required. However, the Supreme Court has recently rejected heightened pleading standards under the Federal Rules of Civil Procedure for almost all claims except fraud and mistake. *Leatherman v. Tarrant County Narcotics Intelligence and Coord. Unit*, 113 S. Ct. 1160, 1163 (1993).[2]

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[2]In *Leatherman*, the Court was concerned solely with the issue of whether the federal courts may apply a heightened pleading standard to § 1983 claims against municipalities. Nonetheless, the Court's analysis encompasses almost all claims subject to Federal Rules of Civil Procedure 8 and 9, as other federal courts have recognized. *See Mid America Title Co. v. Kirk*, 991 F.2d 417, 421 (7th Cir.) (Copyright Act, 17 U.S.C. § 101, *et seq.*), *cert. denied*, 114 S. Ct. 346 (1993); *Warwick Administrative Group v. Avon Products, Inc.*, 820 F. Supp. 116, 120 (S.D.N.Y. 1993) (CERCLA, 42 U.S.C. § 9607(a)); *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 268 (N.D. Ill. 1993) (False Claims Act, 32 U.S.C. § 3729, *et seq.*).

(Cont'd)

The Court specifically noted that the imposition of any heightened pleading requirement must be made by amendment to Federal Rules 8 and 9, rather than by judicial interpretation. It stated that, "[i]n the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman*, 113 S. Ct. at 1163. Thus, the *Leatherman* standard applies to § 1985 claims.

A sufficiently pleaded complaint "will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Plaintiff must give " '[s]ome facts as to when, how, to whom, and with what results such discrimination has been applied.' " *Grohal v. Stauffer Chemical Co.*, 385 F. Supp. 1267, 1268 (N.D. Cal. 1974) (quoting *Ogletree v. McNamara*, 449 F.2d 93, 98 (6th Cir. 1971)).

[11] In this case, the district court found that while Dr. Fobbs alleged the requisite elements for conspiracy under § 1985(3), these allegations were too broad and conclusory. *See Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir.), *cert. denied*, 454 U.S. 967 (1981). Dr. Fobbs has alleged that (1) defendants entered into a conspiracy; (2) the purpose was to deprive himself and his minority patients of equal protection of the laws based on his race and the races of his patients; and (3) these acts deprived plaintiff of his rights and privileges as an American citizen.

(Cont'd)

Cf. Branch v. Tunnell, 14 F.3d 449 (9th Cir.) (justifying application of heightened pleading standard on the ground that the Supreme Court expressly declined to decide whether its "qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 456 (quoting *Leatherman*, 113 S. Ct. at 1162)), *petition for cert. filed*, 62 U.S.L.W. 3575 (1994).

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[12] In support of his conspiracy allegation, Dr. Fobbs has also pled that overt acts were done in furtherance of the conspiracy, including, *inter alia*: (1) attempts to limit or eliminate Dr. Fobbs' surgical privileges at defendant Medical Center; (2) the September 30, 1988 suspension of Dr. Fobbs' medical privileges; (3) attempts to cause the California State Board of Medical Quality Assurance ("CSBMQA") to take disciplinary action against Dr. Fobbs; (4) damage to Dr. Fobbs' practice and professional relationships by causing the CSBMQA to report the restrictions on Dr. Fobbs' privileges to numerous medical facilities and medical insurance carriers and the Texas State Board of Medical Examiners; (5) successful attempts to cause defendant St. Agnes Medical Center to take disciplinary action against Dr. Fobbs by making false accusations against him; (6) defamation of Dr. Fobbs' skill and qualifications as a physician and surgeon; and (7) interference with the granting and retention of full obstetric and gynecological and laser surgical privileges at St. Agnes, Fresno Community Hospital, Clovis Community Hospital and the Fresno Surgery Center.

The district court dismissed the claim because "the existence of a conspiracy and the roles of the various defendants in such a conspiracy remains obscure. It is unclear whether plaintiff claims he was discriminated against because of his race, that he was discriminated because of his patients' races, or that his patients were discriminated against because of their race." The district court appears to believe that plaintiff may legitimately allege only one theory of conspiracy. In evaluating a complaint, however, "any doubts should be construed in favor of the pleader." *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980). Construing the district court's doubts in Dr. Fobbs' favor, it seems that he is alleging all three theories that the court has identified; furthermore, Dr. Fobbs appears to also allege that his patients were discriminated against because of *his* race.

[13] These theories of discrimination, coupled with Dr. Fobbs' catalog of defendants' allegedly discriminatorily motivated overt acts give defendants fair notice as to the specific acts which Dr. Fobbs contends demonstrate a conspiracy to interfere with his right and privilege to practice medicine based on his race and on the race of his patients.

Finally, defendants contend that (1) plaintiff is claiming discriminatory impact, rather than animus, (2) plaintiff has failed to identify the rights, privileges and immunities which he has been denied, (3) plaintiff has failed to demonstrate how he has been discriminated against because of his patients' races, and (4) plaintiff does not have standing to assert his patients' claims of race discrimination. The first three of these contentions lack merit.

First, Dr. Fobbs has alleged that defendants targeted him because of his race, not that defendants' actions had an adverse impact on him as a black man. *See Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268 (D.C. Cir. 1991).

Second, Dr. Fobbs has identified the practice of medicine as a privilege under Article IV, § 2 of the Constitution, *see Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 (1985), and his right to be free from improper racial discrimination under the Fourteenth Amendment of the Constitution.

Third, Dr. Fobbs has presented a colorable claim that his privileges were restricted because he treated primarily patients of color.

[14] Defendants are correct, however, with respect to Dr. Fobbs' standing to sue under § 1985 on the claim that defendants conspired to racially discriminate against his

patients. Where a physician seeks declaratory or injunctive relief, he has standing to bring action on behalf of patients who are members of a protected class for conspiracy to deprive the patients of equal protection of laws and equal privileges and immunities of national citizenship. *See Cousins v. Terry*, 721 F. Supp. 426, 428-29 (N.D.N.Y. 1989). *Cf. Haskell v. Washington Township*, 864 F.2d 1266, 1274-76 (6th Cir. 1988) (physician has standing to bring suit for equitable relief on behalf of his patients based on harm to his patients and has personal standing to bring suit for monetary relief based on harm to his financial interests). As discussed above with regard to his Title VI claim, Dr. Fobbs does not have standing to bring a suit on behalf of his patients, where he seeks money damages. *See City of Joliet*, 432 F. Supp. at 351.

[15] Because Dr. Fobbs has stated a colorable claim of conspiracy, we reverse the district court's dismissal of his § 1985(3) claim. However, the dismissal of those aspects of the claim alleging racial discrimination against Dr. Fobbs' patients is affirmed.

II. *CONCLUSION*

The district court's grants of summary judgment on Dr. Fobbs' Sherman Antitrust Act and § 1981 claims are AFFIRMED.

The district court's dismissals of Dr. Fobbs' Title VI and § 1985(3) claims are REVERSED as to those parts which allege racial discrimination solely against Dr. Fobbs and AFFIRMED with respect to the allegations of discrimination against his patients.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA FILED MARCH 17, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-89-682-REC

DENARD FOBBS, M.D.

Plaintiff,

v.

HOLY CROSS HEALTH SYSTEM CORP. dba SAINT AGNES HOSPITAL AND MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM, M.D.; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; and LARRY E. NIX, M.D.

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On October 15, 1991, the court heard defendants' motion for partial summary judgment. Upon due consideration of the written and oral arguments of the parties, the court now enters its order granting the motion as set forth herein.

In this motion physician-defendants seek summary judgment of plaintiff's Sherman Act claim. Corporation-defendants have joined in physician-defendants' motion for

summary judgment. Physician-defendants and corporation-defendants are collectively referred to as "defendants."

I. *Background*

Plaintiff is a physician licensed to practice medicine in the States of California and Texas. He has conducted an obstetrics and gynecology (hereinafter "ob/gyn") practice in Fresno since 1982. All physician-defendants are also licensed to practice medicine in the State of California, and conduct ob/gyn practices in Fresno County.

Defendant St. Agnes Medical Center, a not-for-profit corporation, is a wholly-owned subsidiary of defendant Holy Cross Health System Corp., also a not-for-profit corporation. St. Agnes is an ob/gyn facility in Fresno County. At one point or another, all physician-defendants were members of various staff committees at St. Agnes.[1]

Plaintiff became a member of the Department of Obstetrics-Gynecology/Perinatology at St. Agnes in 1982. In 1987, St. Agnes granted plaintiff temporary privileges to perform intra-abdominal laser surgery.[2] After plaintiff had performed a few intra-abdominal laser surgeries, defendants state that "concerns were raised as to possible irregularities with respect to Plaintiff's

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1. Drs. Cahill, Christensen, Gavin, Kim, Meltvedt, Noel, Rosenstein, Wilson and Nix were all members of St. Agnes' Ob-Gyn/Perinatology Supervisory Committee. Drs. Bergmann and Steinke were members of the hospital's Judicial Review Committee.

2. Defendants' assert that plaintiff's privileges were granted on a case-by-case basis. Plaintiff disputes this assertion.

handling of these cases." Consequently, the Ob-Gyn/ Perinatology Supervisory Committee (hereinafter "Supervisory Committee") invited plaintiff to discuss three specific cases on March 30, 1987. As a result of this meeting, copies of the three cases were sent to Dr. Ostergard for review. Dr. Ostergard is a professor and a former mentor of plaintiff's.

Dr. Ostergard's report is interpreted differently by plaintiff and defendants. Defendants assert that Dr. Ostergard was critical of plaintiff's management of the cases which were submitted for his review, while plaintiff asserts that Dr. Ostergard was primarily critical of the hospital. Both assertions are true to an extent.

St. Agnes' Tissue and Blood Usage Committee (hereinafter "TBU Committee") reviews all surgical cases in which a specimen is removed. On March 14, 1987, the TBU Committee referred a case of plaintiff's to the Supervisory Committee. The members of the Supervisory Committee arranged for plaintiff to discuss this case with them on May 26, 1987.

The Supervisory Committee determined that plaintiff had improperly managed this case and the aforementioned three cases, and made a recommendation to the Medical Executive Committee (hereinafter "MEC") that plaintiff be made subject to a monitoring system.

On June 23, 1987, based upon the Supervisory Committee's review of these four cases and its recommendation that a monitoring system be established, the MEC imposed monitoring and consultation restraints on patients admitted to St. Agnes by plaintiff. Restraints consisted of the following:

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1. Plaintiff was to have a second opinion on every admission to Saint Agnes Medical Center;

2. This was to include a history and physical examination by the monitor;

3. On any surgical procedure, the monitor was to be present during the operation;

4. The follow-up care of the patient was to be shared with the monitor;

5. The monitors were to be members of the Ob-Gyn Perinatology Supervisory Committee.

On July 14, 1987, plaintiff met informally with the MEC to discuss the monitoring restraints. The MEC decided to continue the monitoring system and directed the Supervisory Committee to conduct a further review of plaintiff's cases.

Members of the Supervisory Committee conducted a random review of plaintiff's cases and determined that four more had been improperly managed. These cases, plus the previous four, were included in a formal notice of charges to be reviewed by St. Agnes' Judicial Review Committee (hereinafter "JRC").

The JRC conducted a review of the eight cases at a hearing on September 15 and 24, 1987. On October 20, 1987, the JRC affirmed the MEC's decision to continue monitoring plaintiff. Plaintiff subsequently appealed this decision to the Appeal Board of the Board of Trustees (hereinafter "Appeal Board"). The Appeal Board ordered the JRC to reopen the hearing in order to consider additional evidence to be provided by plaintiff which the

JRC had not previously had before it. The Appeal Board also provided that the parties would be represented by counsel at the reopened hearing.

On February 22, 1988, the JRC affirmed the MEC's decision to impose a monitoring system on plaintiff, with modifications. The JRC defined the circumstances which would require a "mandatory consult," and limited the duration of the monitoring restrictions to November 20, 1988, at which time the MEC was to review plaintiff's progress and make recommendations as to the continued viability of his privileges at St. Agnes.

On February 24, 1988, plaintiff appealed this decision of the JRC to the Appeal Board. On April 19, 1988, the Appeal Board received argument from counsel for both plaintiff and the MEC. Plaintiff's counsel argued, and the MEC agreed, that plaintiff had wrongly been denied the right to conduct voir dire of the JRC members at the previous hearings.[3] As a result, the Appeal Board made the following recommendations:

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3. Plaintiff alleges the following concerning the original composition of the JRC,

> The panel of judges consisted of direct competitors of the Plaintiff (Drs. Steinke, Bergman, and Duprey); of one person who had exhibited personal animosity toward the Plaintiff, who had treated one of the patients involved, and who was in process of entering into a partnership with 2 of Plaintiff's accusers on the OB/GYN Perinatology Supervisory Committee, such accusers having made no secret of his dislike of the Plaintiff (Dr. Bergman, who was married to Dr. Noel); and of other persons who received referrals from Plaintiff's accusers on the OB/GYN Perinatology Supervisory Committee (Drs. Lattin, Schwartz, Tasto, and Weinberg).

(Cont'd)

1. that the matter be remanded to a newly constituted JRC with new members for further review and decision;

2. that the parties have the right to engage in voir dire examination of the members of the newly formed JRC;

3. that the requirements of monitoring upon plaintiff be continued until further decision of the JRC; and

4. that the JRC promptly conduct its review and make its recommendation to the Board of Trustees of St. Agnes Medical Center and report the decision within thirty days from the date of remand.

St. Agnes' Board of Trustees approved the Appeal Board's recommendation.

The JRC decided to allow both parties to be represented by counsel at the remand hearing.

The remand hearing was originally set for May 9, 1988, however, due to conflicts in both parties' schedules, it was postponed to June 13 and 14, 1988. The JRC set voir dire for June 10, 1988. The hearing was then again postponed, to August 1 and 2, 1988, with voir dire on July 28, 1988, in order to accommodate the schedule of plaintiff's new counsel.

(Cont'd)

Plaintiff also asserts that the JRC wrongly considered the additional group of four cases as they did not form part of the basis upon which the original monitoring restrictions were imposed.

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On July 15, 1988, plaintiff informed the JRC that he would not participate in the remand hearing or any other proceedings. Plaintiff states that he "desired that the administrative hearing proceed to its conclusion so that he could seek review in the court, and [he] determined that further participation would be futile in view of the erroneous and unfair hearing standards."[4] Plaintiff further states that "[a]lthough [he] did not physically appear, [he] did not waive his right to a hearing and desired that the hearing proceed to conclusion, to permit subsequent judicial review."

The JRC met on August 1, 1988, to determine whether plaintiff had good cause for his decision to withdraw from further proceedings. At the onset of the hearing, the hearing officer conducted a pseudo-voir dire of the new JRC members. Each member indicated that he or she could fairly and impartially consider the matter before him or her.

The JRC then decided that plaintiff did not have good cause for failing to attend the hearing and deemed him to have voluntarily accepted the monitoring restraints.

On August 10, 1988, plaintiff performed a Cesarean Section without obtaining a consultation as required by the monitoring system. On August 26, 1988, plaintiff met with the MEC regarding his compliance with the monitoring system. At this meeting plaintiff indicated that he had not complied with the system in connection with the patient upon whom he had

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4. As with the original composition of the JRC, plaintiff felt the remand JRC was biased against him, alleging that two members were direct competitors of his, that one received referrals from one of plaintiff's "accusers," that the hearing officer told him that he would not allow plaintiff to "voir dire him," and that no member was versed in laser surgery.

performed the Cesarean, and that he did not plan to comply in the future.[5] At this juncture, plaintiff's medical staff membership at St. Agnes was suspended. Defendants assert that this suspension was a final decision, however, plaintiff contends that it was not.

On August 29, 1988, plaintiff received notice of his suspension and his right to appeal. Thereafter, plaintiff informed the MEC that he would not participate in an appeal or hearing unless:

1. the earlier imposed monitoring was curtailed; and

2. the hearing was fair, meaning

    a. the hearing officer is unbiased and has no pecuniary interest in the matter;

    b. all members of the hearing panel are not in competition with plaintiff and are from outside of the Fresno/Modesto area; and

    c. at least one member of the hearing panel has knowledge and experience in laser abdominal surgery.

The MEC considered plaintiff's letter ambiguous regarding his decision to appeal his suspension and allowed him 15 more days to request a hearing. In a letter dated September 29, 1988,

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5. In his Statement of Genuinely Disputed Material Facts, plaintiff states that he had never complied with the monitoring restrictions and that defendants' acquiescence to such non-compliance indicates that they "did not consider the restrictions in good faith to protect the health of patients."

plaintiff declined to request a hearing.

Meanwhile, on September 8, 1988, plaintiff filed a complaint with the Office of Civil Rights of the United States Department of Health and Human Services (hereinafter "OCR") against St. Agnes. The complaint alleged race discrimination.

In August of 1989, after conducting a detailed investigation which entailed review of patient charts and transcripts of the hearings held in the hospital's administrative process, the OCR and St. Agnes entered into a Voluntary Settlement Agreement. This agreement provided for the restoration of plaintiff's staff privileges with a system of monitoring restraints similar to those previously imposed. Plaintiff was afforded 30 days to decide whether to seek reinstatement pursuant to the terms of the agreement. The agreement also stated that should plaintiff refuse to accept the restrictions on his privileges, neither St. Agnes and OCR would have any further obligation to verify his compliance with the terms of the agreement.

Plaintiff refused to accept the terms of the agreement.

On September 29, 1989, plaintiff filed this action against defendants. Defendants moved to dismiss. The parties stipulated to dismissal in February of 1990. Plaintiff then filed a First Amended Complaint on May 7, 1990, alleging claims under (1) the Sherman Act; (2) the Cartwright Act; (3) 42 U.S.C. 1981; (4) Title VI of the Civil Rights Act; and (5) 42 U.S.C. 1985(3). Defendant-physicians moved to dismiss plaintiff's Second and Fifth claims for relief. Defendant-St. Agnes joined the motion and also moved to dismiss plaintiff's Fourth claim for relief. On May 11, 1990, the court dismissed all three causes of action and granted plaintiff leave to amend his Fourth and Fifth claims.

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Plaintiff filed his Second Amended Complaint on June 20, 1990, alleging causes of action for (1) the Sherman Act; (2) 42 U.S.C. 1981; (3) Title VI; and (4) 42 U.S.C. 1985(3). Physician-defendants moved to dismiss the Fourth claim. Defendant-St. Agnes joined this motion and also moved to dismiss plaintiff's Third cause of action. On August 30, 1990, the court dismissed plaintiff's Third and Fourth claims.

Defendants subsequently moved for partial summary judgment as to plaintiff's Second cause of action and on November 28, 1990, the court granted this motion. In this motion defendants seek summary judgment as to plaintiff's only remaining cause of action, his Sherman Act claim[5]. Defendants

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5. Specifically, this cause of action alleges that in furtherance of a conspiracy and with the intent of competitively harming plaintiff, defendants committed the following acts (plaintiff refers to St. Agnes and Holly Cross collectively as "Saint Agnes Medical Center"),

> A. Attempted to curtail or eliminate Plaintiff's surgical privileges at Defendant SAINT AGNES MEDICAL CENTER, and . . . did cause Plantiff FOBBS' surgical privileges . . . to be suspended;
>
> B. Attempted to cause the California State Board of Medical Quality Assurance to take disciplinary action against Plaintiff FOBBS. They did succeed in causing the State Board . . . to report restrictions of privileges to numerous medical facilities and medical insurance carriers and the Texas State Board of Medical Examiners resulting in damaging effects on Plaintiff's practice and professional relationships.
>
> C. Attempted to cause, and have caused, Defendant

(Cont'd)

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make this motion on the basis that, pursuant to the federal Health

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(Cont'd)

SAINT AGNES MEDICAL CENTER to take disciplinary action against FOBBS by making false accusations against him.

D. Defamed Plaintiff FOBB's skill and qualifications as a physician and surgeon . . .

E. Interfered with granting and retention of full obstetric and gynecological and laser surgical privileges at Defendant SAINT AGNES MEDICAL CENTER, FRESNO COMMUNITY HOSPITAL, CLOVIS COMMUNITY HOSPITAL and THE FRESNO SURGERY CENTER.

F. Caused the individual named defendants practicing at Defendant SAINT AGNES MEDICAL CENTER to dominate all Hospital policy making committees and offices and to place Plaintiff in a false light.

G. Caused Defendant SAINT AGNES MEDICAL CENTER to discriminate against Plaintiff in the rendition of the services that Defendant SAINT AGNES MEDICAL CENTER performs for physicians;

H. Caused Defendant SAINT AGNES MEDICAL CENTER to discriminate against Plaintiff in the manner of reviewing surgical cases, in that they caused Defendant SAINT AGNES MEDICAL CENTER to review the surgical cases of Defendants Drs. NIX, CHRISTENSEN and MELTVEDT and others in a manner which sheltered their practice from critical review.

(Cont'd)

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Care Quality Improvement Act of 1986, 42 USC 11101-11152 (hereinafter the "HCQIA" or the "Act"), they are entitled to qualified immunity from plaintiff's Sherman Act claim.

This court has jurisdiction under 28 USC 1337.[7]

(Cont'd)

I. Caused Defendant SAINT AGNES MEDICAL CENTER to discriminate against Plaintiff in the referral of patients needing surgery, so that Defendant SAINT AGNES MEDICAL CENTER regularly referred patients to other physicians rather than to Plaintiff;

J. Refused to provide other medical services to patients who consult Plaintiff for surgery, and otherwise prevented Plaintiff from treating patients whom they regard as their own;

K. Caused Defendants SAINT AGNES MEDICAL CENTER, VALUCARE, a Health Maintenance Organization health provider and THE FRESNO SURGERY CENTER to divert patients of Plaintiff's to other physicians;

L. Refused to extend normal professional courtesies to Plaintiff in the care of his patients.

Plaintiff further alleges that defendants have attempted to "monopolize the practice of obstetrics and gynecology, laser surgery and laparoscopic out patient surgery" by the above-described acts.

7. Section 1337 provides, in part,

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of

(Cont'd)

Appendix C

II. *Summary Judgment Standard*

Summary judgment is properly granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FRCP 56.[8]

"[A] party seeking summary judgment always bears the

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> Congress regulating commerce or protecting trade and commerce against restaints and monopolies . . .

8. Rule 56 provides,

> (b) A party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) . . . judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law . . .
>
> . . . .
>
> (e) . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegation or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided . . . must set forth specific facts showing that there is a genuine issue for trial . . .

initial responsibility of informing the court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). This responsibility is simply one of *pointing out* to the court that there is an absence of evidence to support the nonmovant's case, it is not a responsibility of *producing evidence* showing the absence of a genuine issue of material fact. *Id.* at 325.

When a properly supported motion for summary judgment is made, the nonmovant must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 (1986). The court's function is not to weigh the evidence and determine the truth of the matter. Instead, the court's function is to perform "the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Id.* at 250.

III. *The Health Care Quality Improvement Act of 1986*

When it promulgated the HCQIA in 1986, Congress made the following findings:

> 1. The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

2. There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

3. This nationwide problem can be remedied through effective professional peer review.

4. The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

5. There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 USC 11101.

To address the concerns identified in its findings, Congress provided for limited liability in connection with professional review action taken by a professional review body provided that the action meets specified standards.

"Professional review body" is defined as "a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when

assisting the governing body in a professional review activity." 42 USC 11151(11).

"Professional review activity" is defined as any activity of a health care entity concerning a particular physician,

> (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,
>
> (B) to determine the scope or conditions of such privileges or membership, or
>
> (C) to change or modify such privileges or membership.

42 USC 11151(10).

"Professional review action" is defined as,

> an action or recommendation of a professional review body which is taken or made in the conduct of a professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation

> described in the previous sentence and also includes professional review activities relating to a professional review action.

42 USC 11151(9).

The limitation on damages for professional review actions is set forth in § 11111. This section provides:

> If a professional review action.... of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section —
>
> (A) the professional review body,
>
> (B) any person acting as a member or staff to the body
>
> (C) any person under a contract or other formal agreement with the body, and
>
> (D) any person who participates with or assists the body with respect to the action, shall not be liable in damages under any law of the United States or of any State . . . with respect to the action. The preceding does not apply to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and the Civil Rights Acts, 42 U.S.C. 1981 et. seq. Nothing in this paragraph shall prevent

> the United States or any Attorney General of a State from bringing an action, including an action under section 4C of the Clayton Act, 15 U.S.C. § 15C. . .where such an action is otherwise authorized.

42 USC 11111(a)(1).

For a professional review body to be protected under § 11111(a)(1), the professional review action of that body must be taken,

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding

> standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 USC 11112(a).

A health care entity is deemed to have met the "adequate notice and hearing procedures" required in § 11112(a)(3) if the physician has been given notice stating:

> (A)(i) that a professional review action has been proposed to be taken against the physician,
>
> (ii) reasons for the proposed action,
>
> (B)(i) that the physician has the right to request a hearing on the proposed action,
>
> (ii) any time limit (of not less than 30 days) within which to request such a hearing, and
>
> (C) a summary of the rights in the hearing under paragraph (3) . . .

42 USC 11112(b)(1). This section goes on to discuss the manner in which notice of a hearing must be given and how the hearing must be conducted. It further provides that "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section."

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If a health care entity does any of the following it must file a report with the Board of Medical Examiners:

> (A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;
>
> (B) accepts the surrender of clinical privileges of a physician
>
> > (i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or
> >
> > (ii) in return for not conducting such an investigation or proceeding; or
>
> (C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society.

42 USC 11133(a)(1).

The report made by the health care entity to the Board of Medical Examiners must include the name of the physician, a description of the physician's acts or reasons for the entity's action, and other appropriate information regarding the circumstances surrounding the entity's action. 42 USC 11133(a)(3).

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Upon the failure of a health care entity to file a report, the Secretary shall conduct an investigation. If, after notice of noncompliance, an opportunity to comply and an opportunity for a hearing, the Secretary determines that the health care entity has failed substantially to report required information, such entity shall not be entitled to the limited liability protection afforded under the HCQIA for a period of three years. 42 USC 11111(b).

IV. *Summary Judgment and the Health Care Quality Improvement Act*

Defendants argue that when Congress enacted the HCQIA it intended to provide particular defendants with immunity during the early stages of litigation, and not just as a defense to be used at trial. Defendants quote from the legislative history of the HCQIA in support of their conclusion that Congress intended peer review cases to be decided upon motions for summary judgment.

> The Committee intends that these provisions allow defendants to file motions to resolve the issue of immunity in as expeditious a manner as possible. The provisions would allow a court to make a determination that the defendant has or has not met the standard specified in Section 102(a). The Committee intends that the court could so rule even though other issues in the case remain to be resolved. For example, a court might determine at an early stage of litigation that the defendant has met the 102(a) standards, even though the plaintiff might be able to demonstrate that the professional review action was otherwise improper. At that point,

> it would be in order for the court to rule on immunity. In such a case, the court could still proceed to determine whether injunctive declaratory or other relief would be in order.

H.R. Rep. No. 903, 99th Cong., 2d Sess. 10, *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 6384, 6394.

Defendants analogize the immunity provided in the HCQIA with that afforded to government officials as enunciated in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). By passing the HCQIA, argue defendants, Congress balanced the interests of the public in receiving quality health care through effective peer review against the interests of physicians in challenging peer review determinations. Similarly, in *Harlow,* the Supreme Court balanced the interests of the public in seeking the enforcement of their rights against the interests of society in protecting government officials' ability to perform their jobs without threats of liability. In order to determine whether a government official is qualifiedly immune, the Supreme Court developed an objective test in *Harlow* under which the official may assert that her conduct is qualifiedly immune. Defendants assert that the Court used an objective standard to determine immunity because it was "particularly suitable for disposition by way of summary judgment." As the Court noted,

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.

Id., at 818.

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In the HCQIA, Congress also chose an objective standard,

> Initially, the Committee considered a "good faith" standard for professional review actions. In response to concerns that "good faith" might be misinterpreted as requiring only a test of the subjective state of mind of the physicians conducting the professional review action, the Committee changed to a more objective "reasonable belief" standard. The Committee intends that this test will be satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients.

H.R. Rep. No. 903, 99th Cong., 2d Sess. 10 *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 6287, 6392-94.

Based on the foregoing, defendants conclude that the standard in the HCQIA is similar to the objective standard used in *Harlow.*[9]

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9. As a matter of interest, to the court's knowledge, the District Court for the Central District of California is the only court in the Ninth Circuit which has been called upon to interpret the HCQIA and determine whether the summary judgment stage is the appropriate point at which to determine the immunity of the defendants. In that case, *Austin v. McNamara*, 731 F. Supp. 934 (1990), the district court granted defendants' motion for summary judgment, finding that the HCQIA immunized defendant hospital and individual physician defendants from federal antitrust liability for their conduct in connection with the suspension and subsequent reinstatement of plaintiff's staff privileges. The court determined that the

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V. *Application of the Health Care Quality Improvement Act to the Facts of this Case*

As a preliminary matter it must be noted that the immunities provided in the HCQIA apply to "professional review actions commenced on or after the date of enactment of the Act, [November 14, 1986]." Pub. Law No. 99-660, § 46. As defendants' first professional review action, the imposition of monitering restraints, occurred on June 23, 1987, the professional review actions at issue here occurred after the effective date of the Act.

Defendants assert that there are two distinct professional review actions at issue here: the imposition of the June 23, 1987, monitoring restraints on plaintiff, and the August 26, 1988, summary suspension of plaintiff. Defendants address these two actions separately, arguing that the HCQIA standards were met in each.

Plaintiff counters that defendants' conduct, taken as a whole, consists of professional review activity and, because professional review action encompasses professional review activity, defendants' entire course of conduct, not just two discrete actions, is subject to evaluation. Consequently, plaintiff argues that for defendants to qualify for immunity, their entire conduct must meet the standards set forth in 42 USC 11111-11152.

As noted *supra*, § 11151(9) defines professional review

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defendants' actions were in the interest of furthering the quality of health care at defendant hospital, and were only taken after extensive evaluations, monitoring and hearings at which plaintiff was allowed to defend himself. *Austin* is currently on appeal to the Ninth Circuit.

action as that taken in the conduct of professional review activity and as including professional review activities relating to a professional review action. Section 11151(10) defines professional review activity as an activity to determine a physician's clinical privileges, the scope and condition of such privileges and any change or modification of privileges. To paraphrase Mr. Justice Scalia, the court finds this definition about as helpful in determining the correct application of this Act as "life is a fountain." *H.J. Inc. v. Northwestern Bell Telephone Co.*, __U.S.__, 109 S. Ct. 2893, 2907 (1989) (*concurring opinion*). However, using what small clues of interpretation that Congress provided the in language of these sections, the court believes that professional review activity means the investigative process during and/or upon which a professional review action, i.e., a decision is made. The professional review action/decision is borne of the investigative process and may entail a secondary level of additional, more narrowed investigation as needed based on information discovered during the initial investigation. This leaves the question "for what does the HCQIA provide immunity?"

The HCQIA provides immunity for discrete professional review actions/decisions which meet particular standards, i.e., reasonable belief that the action furthered quality health care, fact gathering, notice and hearing, and a resulting reasonable belief that the action taken was warranted. The HCQIA does not require that a professional review body's entire course of investigative conduct meet particular standards in order for it to be immune from liability for its ultimate decision. Two reasons support this conclusion. First, it would be impossible to apply the § 11112(a) standard to acts which are encompassed within the standard. For example, the standard requires that reasonable efforts be made to obtain the facts of the matter, the facts of the

matter meaning those upon which the professional review action was based. These facts will be called facts "Y". Plaintiff would apparently require that the whole § 11112(a) standard apply to the process of gathering facts "Y". In other words, before a fact "Y" investigation is undertaken plaintiff would require that a reasonable effort be made to obtain the facts supporting the act of initiating a fact "Y" investigation, in addition to adequate notice and hearing regarding the fact "Y" investigation. This is nonsensical. The standard is intended to apply to discrete decisions, not to an ongoing course of conduct.

Second, because the HCQIA provides protection for particular health care defendants, its application is invoked by defendants. Consequently, a defendant, in effect, must act as a tailor and match particular professional review actions which it has taken with the allegations of a plaintiff's complaint. That is what defendants have attempted to do here. As outlined above, plaintiff's complaint makes many general allegations. It would be a nearly insurmountable chore for these defendants, or any defendants, to attempt to prove HCQIA immunity for each aspect of their entire course of conduct in response to a plaintiff's general allegations of misconduct. Such a duty would reduce the efficaciousness of the HCQIA and defeat Congress' stated purpose in promulgating it. Defendants have attempted to invoke HCQIA immunity in the only apparent reasonable manner, i.e., by setting forth two discrete professional review actions (not all of the professional review activity connected therewith) and then measuring them up against the HCQIA standards. Therefore, the following discussion addresses the two professional review actions as identified by defendants and the manner in which defendants presented them.

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A. *The Professional Review Action of June 23, 1987*

1. *§ 11112(a)(1) — Was the Imposition of a Monitoring System Taken in the Reasonable Belief that it was in the Furtherance of Quality Health Care?*

Quoting from the legislative history of the HCQIA, defendants assert that this prong is met if "the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." H.R. Rep. No. 903, 99th Cong., 2d Sess. 10, *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 6287, 6393. Defendants assert that the MEC voted to impose monitoring restraints on plaintiff "in the interest of furthering quality health care at Saint Agnes Medical Center." The MEC reached the decision to impose a monitoring system after reviewing a small number of plaintiff's cases wherein the quality of care was considered below St. Agnes' standards, after allowing plaintiff an opportunity to discuss these cases, and after seeking an outside evaluation of these cases. Following imposition of the monitoring system the Supervisory Committee conducted further review of other of plaintiff's cases and gave notice of plaintiff of formal charges to be heard by the JRC. In two subsequent hearings the JRC decided to continue the monitoring system. Admitting that these two hearings did not follow proper procedure in that plaintiff was not allowed to voir dire members of the JRC, defendants agreed to a third JRC hearing in which plaintiff would be given the opportunity to voir dire the JRC members. Plaintiff opted not to participate in this hearing. Voir dire of the JRC members conducted by the hearing officer revealed that each member felt he or she could reach an impartial decision. The JRC then

determined that plaintiff did not have good cause for failing to participate in the hearing and deemed him to have accepted the monitoring restraints.

In addition to the foregoing, defendants also point out that the Voluntary Settlement Agreement entered into between the OCR and St. Agnes shows that the OCR did not find the monitoring system inappropriate in light of the circumstances. Thus, defendants conclude that, "based on the information available to it at the time of imposition of the monitoring and consultation requirements, it was reasonable for the MEC to conclude that the action was necessary to ensure patient safety."

As a preliminary matter plaintiff argues that although a reasonable belief standard is used to determine whether or not the action in question was taken in furtherance of quality health care (citing *Austin v. McNamara,* 731 F. Supp. 934, (1990)), "questions of the reasonableness and good faith of the Defendants' actions are factual questions properly determined by a jury." The court disagrees with plaintiff, finding, as did the *Austin* court, that the question of immunity is a matter of law.

In any event, plaintiff asserts that the reasonable belief standard was not met here. He contends that the number of cases initially investigated and upon which the monitoring restraints were imposed, four, was too small.[10]

The court is satisfied that defendants imposed the monitoring restraints in the reasonable belief that doing so would

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10. Plaintiff makes other assertions in connection with this requirement which are more appropriately treated with the regard to the reasonableness of defendants' belief that the action taken was warranted.

promote quality health care. Defendants' act of imposing the monitoring system was prompted by the concern that plaintiff was providing substandard care. Plaintiff was given the opportunity to discuss the original four cases and was apparently unable to assuage defendants' concern. Accordingly, defendants appropriately dealt with the perceived situation in imposing the restraints and making the decision to conduct additional investigation.

2. *§ 11112(a)(2) — Was the Monitoring System Imposed After a Reasonable Effort to Obtain the Facts of the Matter?*

Arguing that it made a reasonable effort to obtain pertinent facts in this matter, defendants point to the Supervisory Committee's review of eight of plaintiff's cases, the fact that the Committee sought independent review of three of these cases, and the fact that plaintiff was given an opportunity to discuss his management of these cases. This, assert defendants, amount to "diligent efforts to gather relevant facts in compliance with Section 11112(a)(2)."

Plaintiff contends that there is a triable issue of fact as to whether defendants made reasonable efforts to obtain the facts of the matter. For example, plaintiff notes that when defendants requested an independent review of three of his cases, the reviewer was not furnished with complete files.

The court is satisfied that defendants made a reasonable effort to obtain the facts of the matter. Prior to the imposition of the monitoring system defendants reviewed four of plaintiff's cases and gave plaintiff the opportunity to discuss these cases.[11]

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11. The court would note here that even if such effort to obtain facts had not

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After the monitoring began defendants continued to gather facts, conducting both additional internal investigation of plaintiff's cases and asking an outside professional, Dr. Ostergard, to evaluate three of plaintiff's original four cases.[12]

3. *§ 11112(a)(3) — Was Plaintiff Afforded Adequate Notice and Hearing Procedure?*

As noted above, § 11112(b) provides the conditions which a health care entity must meet in order to provide adequate notice and hearing. As also noted above, § 11112(b) provides that the failure of a review body to meet these conditions does not, per se, constitute failure to meet the standards of § 11112(a)(3).

With regard to the § 11112(a)(3) standard, defendants again quote from the legislature history of the HCQIA: "[i]f other procedures are followed, but are not precisely of the character spelled out in [§ 11112(b)], the test of 'adequacy' may still be met under other prevailing law." H.R. Rep. No. 903, 99th Cong., 2d Sess. 10, *reprinted in* 1986 *U.S. Code Cong. & Admin. News*, 6384, 6396. Defendants also note that § 11112(c)(2) provides that for the purposes of § 11112(a), nothing in § 11112 should be construed as "precluding an immediate suspension or restriction

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been made § 11112(c)(2) allows for the immediate restriction of clinical privileges, subject to subsequent notice and hearing, where the failure to take such an action may result in an imminent danger to the health of any individual.

12. Plaintiff's assertion that Dr. Ostergard was not initially supplied with complete patient ch. rts is true. However Dr. Ostergard testified during the January 25, 1988, hearing that he was subsequently supplied with complete files for all four patients except the post-procedure chart of one patient.

of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual." Accordingly, defendants assert that they believed the action of beginning a monitoring system was necessary to protect patient safety, but that they gave plaintiff adequate notice and hearing procedure after the monitoring system commenced by (1) providing notice to plaintiff on June 23, 1987, that a professional review action (the monitoring system) had been taken; (2) notifying plaintiff that he had the right to request a hearing; and (3) providing plaintiff with the opportunity to participate in a remand JRC hearing (after acknowledging that the original JRC hearings were defective in that plaintiff lacked the opportunity to voir dire the JRC members). Plaintiff, however, did not appear at the remand hearing. Therefore, defendants argue, plaintiff forfeited his right to the hearing by failing, without good cause, to appear. Section 11112(b)(3)(B) specifically states that "the right to the hearing may be forfeited if the physician fails, without good cause, to appear."

Plaintiff responds that the procedures provided him were grossly inadequate. In support of this contention he points to the fact that defendants have admitted that he should have been permitted to voir dire the original members of the JRC.[13] Plaintiff

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13. To demonstrate the importance of voir dire plaintiff asserts that the original members of the JRC had "over-lapping" functions,

> Dr. Meltvedt was a member of both the initial accusing body and the subsequent investigatory body. Dr. Bergman was a member of the Judicial Review body, but was married to a member of the initial accusing body. Numerous members of the Judicial Review Committee received referrals from or participated in partnerships with the members of the initial accusing body.

argues that this, alone, should prevent defendants from claiming immunity under the HCQIA.

Also on the issue of the composition of the JRC, plaintiff asserts that fairness would require that the JRC be composed of physicians who were not his direct competitors, and that at least one of them should have been versed in laser surgery.

In addition plaintiff further asserts that he was not given notice that the additional four cases would be considered. This assertion is expressly contradicted by Exh. B to the Declaration of V. Roy Smith. However, even if plaintiff did not receive notice of the use of these four cases, the JRC's consideration of them was appropriate. As the Act's legislative history states,

> [t]he Committee is aware that between the time the initial notice is given of a proposed professional review action and the time of the hearing on that action, the investigation may have uncovered reasons for such an action other than or in addition to the reasons specified in the initial notice. Provided that notice is given in a way that protects the interests of the physicians against whom the action is proposed, a supplemental notice of such additional reasons might well satisfy the requirements of due process.

H.R. Rep. No. 903, 99th Cong., 2d Sess. 10, *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 6384, 6394.

Plaintiff also argues that defendants' manner of giving him notice that his privileges were restricted after the fact was not fair.

In other words, he contends that, barring an emergency "threaten[ing] imminent danger to the health of any individual," process was due before defendants restricted his privileges. Plaintiff asserts that no such emergency existed at the time the monitoring system was established or at the time of his suspension. He additionally contends, without support, that "the Defendants tolerated [his] refusal to abide by the summary restrictions for over a year. If Defendants believed that such failure endangered patient health, they would have acted."

There is no dispute that plaintiff was given notice of the JRC hearings. Therefore the question is whether or not the JRC hearings provided adequate procedure. Plaintiff is correct in his assertion that the first two JRC proceedings were inadequate in that he was not allowed to conduct voir dire of the JRC members. However, defendants recognized this defect and agreed to provide a third hearing in which plaintiff would be able to voir dire the potential JRC members. Plaintiff is also correct in his assertion that it is preferred that the members of the JRC not be in direct economic competition with him. § 11112(b)(3)(A)(ii) and (iii). However, "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the [notice and hearing requirements]." § 11112(b)(3). The court is satisfied that plaintiff was given the opportunity to adequate process, but that he opted not to exercise his right thereto. As § 11112(2)(b) provides, the right to a hearing is forfeited if, absent a showing of good cause, the physician fails to appear. It has been established that the defect of which plaintiff complained, i.e., voir dire of the allegedly biased JRC members, had been acknowledged and would be remedied at the remand hearing. Consequently, plaintiff's failure to appear was not supported by good cause.

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4. *§ 11112(a)(4) — Did Defendants Act in the Reasonable Belief that the Monitoring System was Warranted?*

Defendants do not specifically address this requirement, presumably encompassing it in their foregoing argument. Plaintiff merely states that "since the fourth requirement for immunity incorporates the first three, there are also triable issues as to that requirement." Accordingly, the court must piece together the parties' arguments on this, the most important of the four requirements, based on their foregoing contentions.

Having carefully considered the documentary evidence submitted by both parties, the court is concerned by the fact that defendants decided to continue the monitoring system despite the fact that Dr. Ostergard concluded that plaintiff had provided adequate care in two of the three original cases and that, with regard to the third case, two other doctors agreed that plaintiff's actions therein were reasonable[14]. The court is aware that there is often more than one manner in which to handle a particular medical condition and/or procedure, and that the selection of one alternative over another does not render the care chosen substandard. However, it is also true that those who would make the opposite selection are not necessarily unreasonable in their criticism of the care chosen. Keeping this and the legislative purpose underlying the HCQIA in mind, the court must determine whether or not defendants' decision to maintain the monitoring system was reasonable after fact finding conducted

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14. The court's concern is somewhat intensified by the fact that numerous other submissions by plaintiff reflect that other outside evaluators believe that his handling of the eight cases on contention was generally adequate. However, the court would note that such submissions, found in Exh. JJ-NN, are not claimed to have been submitted to the JRC when it rendered its decision.

by defendants had occurred and the opportunity for an adequate hearing had passed.

Defendants argue they are entitled to a rebuttable presumption that imposition of the monitoring system was warranted, and that plaintiff has failed to carry his burden of rebuttal. § 11112(a). Defendants are only partially correct regarding plaintiff's burden to rebut. In the same legislative history from which defendants quote so extensively, it is clear that the presumption provided in § 11112(a) refers only to the reasonable belief standard of § 11112(a)(1), not to reasonable belief standard of § 11112(a)(4):

> [r]eflecting the Committee's belief that [the 'objective "reasonable belief"] standard will be met in the overwhelming majority of professional review actions, the subsection provides a presumption to that effect, requiring a plaintiff to show, by clear and convincing evidence, that no such reasonable belief existed *at the time of the professional review actions. This presumption applies only to the reasonable belief standard, not to the other standards*. Those additional standards require a group engaged in peer review to make a reasonable effort to obtain the facts, to provide adequate due process, and to have a reasonable belief that the professional review action was warranted by the facts known.

H.R. Rep. No. 903, 99th Cong., 2d Sess. 10, *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 6384, 6393 (emphasis added). Accordingly, defendants are not entitled to a presumption of

reasonableness with regard to § 11112(a)(4). Nevertheless, without expressing an opinion regarding the "correctness" of defendants' act, the court finds that defendants maintained an objectively reasonable belief that their decision to retain the monitoring restrictions was warranted as required by § 11112(a)(4). The facts show that defendants saw a need to investigate plaintiff's cases, that they thereafter imposed the monitoring restrictions but continued to investigate, that the opportunity to have an adequate hearing was offered to plaintiff, albeit after two prior attempts, but that he declined to participate without good cause, and that the foregoing provide support for defendants' decision to retain the monitoring system. Furthermore, it is undisputed that defendants met the requirements of § 11133 by filing with the Medical Board of California the appropriate records regarding the imposition of the monitoring system on plaintiff. Accordingly, immunity extends to physician-defendants and corporation-defendants under the HCQIA in their capacity as a professional review body with regard to the professional review action of imposing the monitoring system on plaintiff.

B. *The Professional Review Action of August 26, 1988*[15]

1. *§ 11112(a)(1) — Was Plaintiff's Suspension Imposed in the Reasonable Belief that it was in the Furtherance of Quality Health Care?*

Defendants contend that their decision to summarily suspend plaintiff was made in the reasonable belief that to do so

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15. Plaintiff does not respond to defendants' August 26, 1988, professional review action of summarily suspending his privileges. Impliedly, he relies on his arguments in the above-discussed professional review action.

was in the furtherance of quality health care. In support of this contention defendants state that the MEC believed plaintiff's failure to comply with the monitoring system could result in a likelihood of significant impairments of the life, health and safety of plaintiff's patients. Defendants point to the fact that the Voluntarily Settlement Agreement between the OCR and St. Agnes also contained monitoring requirements, drawing therefrom the inference that that OCR also believed the monitoring system was necessary to ensure patients' safety.

2. *§ 11112(a)(2) — Was the Plaintiff's Suspension Imposed After a Reasonable Effort to Obtain the Facts of the Matter?*

After plaintiff performed an un-monitored Caesarean Section the MEC provided plaintiff with the opportunity to meet and discuss his compliance with the monitoring restraints. At that meeting plaintiff informed the MEC that he did not plan to comply with the monitoring system in the future. Defendants argue that by reason of this meeting, they must be found to have taken a reasonable effort to obtain pertinent facts.

3. *§ 11112(a)(3) — Was Plaintiff Afforded Adequate Notice and Hearing Procedures?*

Defendants notified plaintiff of his suspension for failure to comply with the monitoring system by memorandum dated August 26, 1988. In that same memorandum defendants informed plaintiff of his right to request a hearing. Plaintiff subsequently declined to exercise his right to a hearing. Defendants contend that the foregoing fulfilled their obligation to provide plaintiff with adequate notice and hearing procedures.

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4. *§ 11112(a)(4) — Was Plaintiff's Suspension Imposed in the Reasonable Belief that Such Action was Warranted?*

The facts show that upon discovering plaintiff's non-compliance with the monitoring system he was summarily suspended, that defendants subsequently attempted to gather facts relating to plaintiff's action and were informed by plaintiff that he had no intention of complying with the monitoring system in the future, the plaintiff waived his right to a hearing on this matter, and that defendants filed a report notifying the California Board of Medical Quality Assurance plaintiff's suspension in accordance with § 11133. Without expressing an opinion regarding the "correctness" of defendants' act, the court is satisfied that defendants' professional review action of suspending plaintiff was objectively reasonable and warranted in light of the facts. Accordingly, immunity extends to physician-defendants and corporation-defendants under the HCQIA in their capacity as a professional review body with regard to the professional review action of suspending plaintiff.

VI. *Applicability California Law*

California law is not applicable to the question of federal immunity under the HCQIA to a federal claim based on the Sherman Antitrust Act.

ACCORDINGLY, IT IS ORDERED that defendants' motion for summary judgment as to plaintiff's Sherman Act cause of action is granted.

JUDGMENT TO BE ENTERED.

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DATED: March 16, 1992

s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED MARCH 17, 1992

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CV F-89-682-REC

DENARD FOBBS, M.D.

vs.

HOLY CROSS HEALTH SYSTEM, et al

JUDGMENT IN A CIVIL ACTION

XX DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED that defendants' motion for summary judgment as to plaintiff's Sherman Act cause of action is granted.

Date: March 17, 1992

JACK L. WAGNER, Clerk
By s/ illegible
Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA FILED NOVEMBER 28, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-89-682 REC

DENARD M. FOBBS, M.D.,

Plaintiff,

v.

HOLY CROSS HEALTH SYSTEM CORP., et al.,

Defendant.

ORDER RE MOTION FOR PARTIAL SUMMARY JUDGMENT

On November 19, 1990, the court heard defendants' Motion for Partial Summary Judgment. Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants this motion for the reasons set forth herein.

Defendants Cynthia Bergmann, M.D., James Cahill, M.D., Jay Christensen, M.D., Charles Gavin, M.D., Seung Nam Kim, M.D., Robert Meltvedt, M.D., Marshall Noel, M.D., Morton Rosenstein, M.D., Roydon Steinke, M.D., Robert Wilson, M.D., and Larry E. Nix, M.D. (hereinafter referred to as the Physician Defendants) have moved for partial summary judgment on the ground that plaintiff's claim for relief pursuant to 42 U.S.C. § 1981 is barred by the statute of limitations. This motion has been joined by the other defendants in this action, Holy Cross

Appendix E

Health System Corporation and Saint Agnes Hospital and Medical Center.

1. *Applicable Limitations Period.*

Plaintiff asserts that the limitations period to be applied to an action pursuant to 42 U.S.C. § 1981 is the two-year period set forth in California Code of Civil Procedure § 339(1) for miscellaneous torts.

However, this court has already ruled that the one-year statute of limitations for personal injury actions in California applies to an action under Section 1981. *Sosa v. Hiraoka,* 714 F.Supp. 1100, 1104 (E.D.Cal. 1988).

2. *Accrual of Cause of Action.*

Defendants contend that plaintiff's cause of action under Section 1981 accrued on August 29, 1988, the date of which plaintiff was notified by personal service of the Medical Executive Committee's decision to summarily suspend plaintiff. Plaintiff responds that the cause of action accrued on September 30, 1988 or on October 10, 1988.

Exhibit A to the Declaration of V. Roy Smith, which document is a memorandum to plaintiff from the Medical Executive Committee dated August 26, 1988 and captioned "Summary Suspension of Medical Staff Membership". Exhibit A states in pertinent part as follows:

> On August 26, 1988, at the meeting of the Medical Executive Committee of Saint Agnes

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> Medical Center, movement was made, seconded and approved, to suspend your medical staff membership for your failure to comply with the imposed monitoring program, and your indication that you would not comply in the future.
>
> Under the Bylaws of the Medical Staff, Section 7.3.2, you have fifteen (15) days from the receipt of this notice to request a hearing. This request shall be placed in writing and addressed to the Medical Executive Committee with a copy to the Administrator.
>
> In the event you do not request a hearing within the time and manner described, you shall be deemed to have waived any right to a hearing and to have accepted the action of the Medical Executive Committee.

This memorandum was personally served on plaintiff on August 29, 1988. On September 6, 1988, plaintiff notified the Medical Executive Committee by letter in pertinent part as follows:

> . . . I will consider no appeal or hearing in this matter unless:
>
> 1. The earlier imposed monitoring is curtailed.
>
> 2. Any further hearing must meet the prevailing standards of fairness; namely,

> a. the Hearing Officer should be acceptably unbiased to both sides of the issue, have no pecuniary interest in the matter,
>
> b. all members of the Hearing Panel must be noncompetitors with myself, and necessarily from outside the Fresno-Madera County area,
>
> c. because this action allegedly stemmed from questions of judgment in regard to laser abdominal surgery, some member of the Hearing Panel would necessarily have knowledge and experience in this discipline.
>
> Finally, if these criteria cannot be met, I consider the matter closed on the hospital level, and would necessarily relegate it to outside agencies and the courts.

By letter dated September 15, Dr. Smith, on behalf of the Medical Executive Committee, responded, stating in pertinent part as follows:

> Your letter dated September 6, 1988 is somewhat ambiguous but it appears to be a request for a Judicial Review Hearing, but only if the Medical Staff accedes to several of your preconditions. As noted above, any

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> Judicial Review Hearing will be conducted in accordance with the Medical Staff Bylaws and we will not agree to preconditions not mandated by the Medical Staf [sic] Bylaws.
>
> In order to give you additional time to consider the consequences of not requesting a Judicial Review Hearing, we will give you an additional fifteen (15) days following receipt of this letter within which to request a hearing . . . In the event that you do not request a hearing which would be conducted in accordance with our Medical Staff Bylaws, you will be deemed to have waived any right to a hearing and accepted the summary suspension.

On September 29, 1988, plaintiff wrote to Sister Ruth Marie notifying her that he would take no further appeal. This action was filed in federal court on September 29, 1989. On October 10, 1988, Dr. Smith wrote to plaintiff as follows:

> We are writing to you in response to your letter dated September 29, 1988, to Sr. Ruth Marie. You letter reflects a decision not to appeal the summary suspension of your clinical privileges. As indicated in my letter to you dated September 15, 1988, you were provided fifteen (15) days following the receipt of that letter within which to request a Judicial Review Hearing. This is in accordance with Section 7.3-2 of the Bylaws of the Medical Staff of Saint Agnes Medical

> Center. It appears from the present letter and the fact that no subsequent letter has been received indicating otherwise, that you have elected not to request a hearing.
>
> As we advised you on September 15, 1988, although a decision not to appeal the summary suspension is entirely within your discretion, Section 7.1-1 of the Bylaws and the relevant case law require exhaustion of administrative remedies before a court action can be instituted. By your decision not to request a hearing, you have waived any right to a hearing and accept the summary suspension.

"While state law determines the period of limitations, federal law determines when a cause of action accrues . . . Under federal law, a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Cline v. Brusett,* 661 F.2d 108, 110 (9th Cir. 1981). In an employment discrimination case, the proper focus for accrual is at the time of the discriminatory act. *See Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) (limitations period held to run from time of notice that appointment would terminate rather than from termination date); *Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980) (limitations period commenced on date that tenure decision made and communicated to Ricks even though position not actually lost until later).

Here, the question is whether plaintiff's Section 1981 claim accrued when plaintiff was notified of the summary suspension or when the limitations for the internal appeal procedures

concerning that summary suspension expired. The court notes that, as a general rule, exhaustion of internal grievance procedures is not required prior to filing an action pursuant to Section 1981. *Gonzalez v. Shanker,* 533 F.2d 832 (2d Cir. 1976); *Jones v. Niagara Frontier Transp. Authority,* 542 F.Supp. 233 (W.D.N.Y. 1981); *Hayworth v. City of Oakland,* 129 Cal.App.3d 723 (1982).

Plaintiff, relying on *Westlake Community Hospital v. Superior Court,* 17 Cal.3d 465 (1976), argues that his claim for relief under Section 1981 accrued at the earliest on September 30, 1988 when the additional 15 days expired. However, the court does not find *Westlake* to be applicable to this cause of action given the holding in *Hayworth v. City of Oakland. Westlake Community Hospital* did not involve the filing of a federal civil rights claim in the absence of the completion of administrative remedies. *Westlake Community Hospital* only holds that the exhaustion of remedies doctrine applies to actions seeking damages for an allegedly wrongful termination of or exclusion from membership in a private organization.

Plaintiff also refers the court to *Johnson v. General Electric,* 840 F.2d 132, 134-136 (1st Cir. 1988). In *Johnson,* the First Circuit noted that a split of authority among the circuits existed, but held that for purposes of Title VII employment discrimination claims, the application of a discriminatory system to a particular substantive decision, such as to promote, demote, fire, or award benefits, constitutes an independent discriminatory act which can trigger commencement of the statute of limitations. Plaintiff relies on *Johnson* in arguing that "[i]n the instant case . . . until the suspension was final, no sooner than September 30, 1989, the plaintiff could have accepted monitoring and received his privileges and the defendants could have rescinded the 'summary suspension'.

The court is not persuaded by this argument. First of all, it assumes that the suspension was final on September 30, 1989. This assumption cannot be squared with the lack of an exhaustion requirement discussed above. Secondly, one of the cases which the First Circuit refused to follow was affirmed by the Supreme Court. *Lorance v. AT&T Technologies, Inc.*, 827 F.2d 163 (7th Cir. 1987), *aff'd*, 490 U.S. ___, 104 L.Ed.2d 961 (1989).

At oral argument, plaintiff contended that the letter notifying plaintiff of his summary suspension should be equated to a notice of intended decision issued by a court. However, again, this argument ignores precedent that exhaustion of internal grievance remedies is not required in order to file an action under Section 1981.

Accordingly, the court holds that plaintiff's claim under Section 1981 accrued as of August 29, 1988.

3. *Equitable Tolling - Exhaustion of OCR Remedies.*

On September 1, 1988, the Office for Civil Rights of the United States Department of Health and Human Services received a complaint from plaintiff alleging that St. Agnes Medical Center suspended plaintiff from staff privileges because of plaintiff's race and national origin and that this action was preceded by a pattern and practice of disparate treatment during plaintiff's four years at St. Agnes Medical Center, including criticism, false accusations, inappropriate reprimands and involuntary monitoring of plaintiff's patients. According to the letter to plaintiff from the Office for Civil Rights dated September 21, 1988 and attached to Dr. Fobbs' declaration:

OCR is responsible for enforcing the

> provisions of several statutes, including Title VI of the Civil Rights Act of 1964; Section 504 of the Rehabilitation Act of 1973; and the Age Discrimination Act of 1975. OCR has legal authority to ensure that recipients of federal financial assistance through HHS do not discriminate against program beneficiaries on the basis of race, color, national origin, handicap, and age. Since St. Agnes Medical Center is a recipient of HHS funds, OCR has jurisdiction to investigate your complaint.

According to exhibits attached to Dr. Fobbs' declaration, the part of this complaint pertaining to suspension of staff privileges was resolved by settlement agreement between the Office for Civil Rights and St. Agnes Medical Center in September, 1989. The part of the OCR complaint pertaining to racial discrimination in the exclusion of minority groups from participation in the peer review process at St. Agnes Medical Center is still being investigated.

Plaintiff argues that accrual of the statute of limitations for his claim under Section 1981 should be tolled because of the pendency of his complaint before the Office for Civil Rights.

In so arguing, plaintiff refers the court to *Donoghue v. Orange County,* 848 F.2d 926 (9th Cir. 1987). In *Donoghue,* the district court dismissed as barred by the statute of limitations the plaintiffs claims under 42 U.S.C. §§ 1983, 1985 and 1986 and pendent state claims for relief and went to jury trial on plaintiff's Title VII claims. In reversing and remanding, the Ninth Circuit explained in pertinent part as follows:

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We think it is clear that we must apply the tolling principles of California law to both the federal and state claims in this case. The teaching of Johnson, Tomanio and Chardon is that there is not federal policy underlying the federal claims which is inconsistent with the application of the state tolling doctrine.

Under California's equitable tolling doctrine, the prior pursuit of a federal remedy may toll he state statute of limitations when a person has 'several formal legal remedies and reasonably and in good faith pursues one.' . . . The doctrine applies to save a state claim from dismissal when a plaintiff has reasonably pursued a concurrent federal remedy . . . The equitable tolling 'rule is not predicated upon the necessity of the completion of one remedy as a prerequisite to the pursuit of the other.' . . . The statute of limitations is tolled during the period while time is consumed in an appeal . . . The doctrine suspends the statute of limitations pending exhaustion of administrative remedies, even though no statute makes exhaustion a condition of the right to sue . . . .

California courts have made it clear that there is a 'definite three pronged test for invocation of this doctrine.' . . . The three core elements are (1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to the defendant in gathering evidence to defend

> against the second claim; and, (3) good faith and reasonable conduct by the plaintiff in filing the second claim . . . This court has reiterated the California test and held that the doctrine would apply if there were 'timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff.' . . . We note that equitable tolling is not applicable when a plaintiff has pursued a remedy as to only one of several distinct wrongs . . . .

Plaintiff has failed in his brief to address the application of any of the three prongs to this action nor has he addressed the exception to application of equitable tolling mentioned above in *Donoghue*. Plaintiff also did not address these matters at oral argument. In pointing out this lapse, the court notes that in *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975), the Supreme Court held that the statute of limitations for a claim brought pursuant to 42 U.S.C. § 1981 is not tolled by the filing of a Title VII charge with the EEOC. In *International Union of Electrical, Radio and Machine Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-240 (1976), the Supreme Court held that there was no tolling of a Title VII claim where the plaintiff initially sought relief under the collectively-bargained grievance procedure and then later sought relief under Title VII. Recently, the Ninth Circuit relied on these cases in holding that the filing of a worker's compensation claim with the California Worker's Compensation Appeals Board did not toll the six-month statute of limitations period for hybrid section 301/duty of fair representation claim. *Harris v. Alumax Mill Products, Inc.*, 897 F.2d 400, 404 (9th Cir.), *cert. denied*, ___U.S.___, 112 L.Ed.2d 73 (1990). The court further notes that the Eighth Circuit has held

pursuit of Title VI remedies does not toll the statute of limitations applicable to a Section 1981 claim. *Chambers v. Omaha Public School Dist.*, 536 F.2d 222, 230-231 (8th Cir. 1976). Moreover, defendants argue that plaintiff's reliance upon *Donoghue* is misplaced because the claims raised by plaintiff in his complaint to the OCR are separate and distinct from the claims raised against them in this cause of action:

> In the OCR administrative proceeding, Plaintiff filed a complaint against St. Agnes Medical Center based upon a violation of Title VI alleging postformation discriminatory conduct. To state a claim under § 1981, a Plaintiff's claim must involve improper conduct at the initial formation of the contract or conduct which impairs the right to enforce contractual obligations. Discriminatory termination claims, by their nature, are not actionable under § 1981 after *Patterson* since the termination occurs only after the initial formation of the contracts (*e.g.*, approval of the application for medical staff membership and the granting of clinical privileges) . . . In addition, the complaint filed with DHHS did not even apply to the Physician Defendants.

The reference to *Patterson* in Defendant Physician's argument quoted above means to refer to *Patterson v. McLean Credit Union*, 491 U.S. __, 105 L.Ed.2d 132 (1989).[1] As explained in

---

1. In a footnote, Defendant Physician's suggest at some length but specifically do not so move that plaintiff has not stated a claim upon which relief (Cont'd)

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Courtney v. Canvon Television & Appliance Rental, 899 F.2d 845, 849 (9th Cir. 1990):

> [In *Patterson*], the Court held that section 1981's reach is restricted to prohibition of 'discrimination only in the making and enforcement of contracts.' . . . 'Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief.' . . . The Court further underscored its position by pointing out that section 1981's prohibition against racial discrimination in the *making* of contracts 'extends only to the formation of a contract, but not to problems that may arise later . . . .' . . . Thus, in the employment context, refusal to hire an employee on the basis of race is actionable under section 1981, whereas subsequent harassment or maltreatment of an employee on account of race is not. '[P]ostformation conduct does not involve the right to make a contract, but rather implicates the performance of established contractual obligations . . . , matters more naturally governed by state contract law and Title VII.' . . . The Court explicitly stated that 'breach of the terms of the contract' is

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(Cont'd)

can be granted under Section 1981. Defendants may well be right, especially given the Ninth Circuit's opinion in *Overby v. Chevron USA, Inc.*, 884 F.2d 470, 472-473 (9th Cir. 1989). However, defendants ask the court to assume for purposes of this motion that Section 1981 applies.

> postformation conduct that is actionable under section 1981 . . . The Court confined the reach of section 1981 concerning the *enforcement* of contracts to 'protection of a legal process, and of a right of access to legal process, the will address and resolve contract-law, claims without regard to race.'

Plaintiff's failure to address or respond to any of these factors or contentions, when conjoined with the cases cited above, persuades the court that equitable tolling does not apply to this action.

4. *Continuing Violation.*

Contending that his declaration "establishes a pattern of discrimination against him via a series of related acts all done for the purpose of causing him to lose his hospital privileges", plaintiff contends that he has shown "a continuing violation, with the result that his cause of action did not accrue until the last discriminatory act, the letter of October 10, 1988, formalizing plaintiff's final suspension effective September 30, 1988."

As recently reiterated in *Green v. Los Angeles County Superintendent of Schools,* 883 F.2d 1472, 1480-1481 (9th Cir. 1989):

> The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements.

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> [A] systematic policy of discrimination is actionable, even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions.

. . .

A discriminatory system or policy, however, is not the only means by which a plaintiff may prove a continuing violation. 'To establish a continuing violation [a plaintiff has] to show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period." ' . . . A continuing violation may thus be established not only by demonstrating a company wide policy or practice, but also by demonstrating a series of related acts against a single individual . . . In the latter instance, '[the] question . . . boils down to whether sufficient evidence supports a determination that the 'alleged discriminatory acts are related closely enough to constitute a continuing violation." ' . . .

However, in *London v. Coopers & Lybrand,* 644 F.2d 811, 816 (9th Cir. 1981), the Ninth Circuit cautioned:

> [O]ur focus in determining whether the alleged civil rights violation is 'continuing' is upon the issue whether a present *violation* still exists, not upon the present effect of a past employment decision . . . Absent special circumstances, a single act by an employer adverse to an employee's interests, such as a discharge, layoff, or failure to transfer or promote, begins the running of the statute of limitations and the natural effects of the allegedly discriminatory act are not regarded as 'continuing.' . . . .

To the extent that Dr. Fobbs' declaration avers discrimination against himself, the court agrees with defendants that plaintiff has not shown that the discrimination is continuing. Defendants thus argue: "Plaintiff was summarily suspended on August 26 [sic], 1988. This is the last alleged discriminatory act of which he complains. Physician Defendants have engaged in no conduct beyond this date that constitutes ongoing discrimination within the meaning of the continuing violation theory."[2]

---

2. The court notes, however, that plaintiff's brief asserts that "[t]he second amended complaint also alleges such patterns of discrimination, both against Dr. Fobbs and against minority doctors and patients." It is possible that plaintiff is relying on the allegation in the Second Amended Complaint of discrimination against minority doctors and patients to establish a continuing violation. If so, plaintiff has failed to produce evidence to support the allegation and raise a genuine issue of material fact that a continuing violation exists sufficient to overcome the bar of the statute of limitations.

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5. *Estoppel.*

Plaintiff argues that if the statute of limitations commenced to run on August 29, 1988, the defendants are estopped to rely upon the defense because the communications from defendants concerning plaintiff's right to appeal the summary suspension pursuant to the bylaws led him to believe that the statute of limitations could not have been to run prior to September 30, 1988.

The court very seriously doubts that the letters from the hospital can suffice to estop defendants from relying on the statute of limitations. In Witkin, 3 *California Procedure,* § 523, p. 550 (3d Ed. 1985), it is explained:

> The estoppel cases appear to fall roughly into three classes: (1) Where the plaintiff is aware of his cause of action and the identity of the wrongdoer, but the latter by affirmative acts induces the plaintiff to refrain from suit . . . (2) Where the plaintiff is unaware of his cause of action, and his ignorance is due to false representations by the defendant . . . (3) Where the plaintiff is unaware of the identity of the wrongdoer and this is due to fraudulent concealment by the defendant . . . .

Here, there is nothing fraudulent about the letters within the general meaning of these lines of cases. Plaintiff in no way was informed that he had to comply with the internal appeal procedures before he could bring an action under 42 U.S.C. § 1981. Moreover, it is clear that certain of plaintiff's causes of action would have to await completion of the internal appeal

process (i.e., pendent claims for damages for wrongful suspension of privileges) while certain others would not. As argued by defendants, plaintiff's ignorance of the law does not estop the assertion of the statute of limitations because of these letters.

Accordingly, it is ordered that defendants' Motion for Partial Summary Judgment is granted and that plaintiff's cause of action for violation of 42 U.S.C. § 1981, if any, is barred by the statute of limitations.[3]

DATED: November 28, 1990

s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge

---

3. Defendants moved the court to treat the Motion for Partial Summary Judgment as unopposed because plaintiff's opposition was untimely. Plaintiff's opposition was due on November 5, 1990. While the opposition was filed with the court on November 5, 1990, it was not served personally served on defendants or served by mail until after November 5, 1990 in violation of Rule 230(c), Local Rules of Practice. The court denied this request at oral argument. However, the court reminds plaintiff's counsel of its duty to comply with the local rules of procedure and warns counsel that any future failure to comply with Rule 230(c) will result in whatever motion is then before the court being treated as unopposed.

No. 94-994

In the Supreme Court

OF THE

United States

OCTOBER TERM 1994

SUPREME COURT, U.S.
FILED
DEC 29 1994
OFFICE OF THE CLERK

DENARD M. FOBBS, M.D.,
Petitioner,
VS.
HOLY CROSS HEALTH SYSTEM CORPORATION, a California Corporation, doing business as SAINT AGNES HOSPITAL and MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM, M.D.; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; and LARRY E. NIX, M.D.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Ninth Circuit correctly uphold summary judgment on Petitioner's 42 U.S.C. § 1981 claim based upon the expiration of the statute of limitations pursuant to the standards established by this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980)?

2. Did the United States Court of Appeals for the Ninth Circuit correctly decline to apply state law tolling doctrines to the accrual of Petitioner's 42 U.S.C. § 1981 claim?

3. Did the United States Court of Appeals for the Ninth Circuit correctly uphold summary judgment on the Sherman Antitrust Act claim where Respondents' imposition of summary monitoring and subsequent summary suspension of Petitioner's medical staff privileges were found by the courts below to have complied with the Health Care Quality Improvement Act standards for such peer review actions?

PARTIES TO THE PROCEEDING

The parties to the proceeding are as stated in the petition. Pursuant to Supreme Court Rule 29.1, Respondent St. Agnes Medical Center, a California non-profit corporation, and Respondent Holy Cross Health System Corporation, an Indiana not for profit corporation, are wholly-owned subsidiaries of the Congregation of the Sisters of the Holy Cross, an Indiana not for profit corporation. Respondent corporations have no other subsidiaries (other than wholly-owned subsidiaries) within the meaning of Supreme Court Rule 29.1.

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No. 94-994

In the Supreme Court

OF THE

United States

OCTOBER TERM 1994

DENARD M. FOBBS, M.D.,
Petitioner,

VS.

HOLY CROSS HEALTH SYSTEM CORPORATION, a California Corporation, doing business as SAINT AGNES HOSPITAL and MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM, M.D.; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; and LARRY E. NIX, M.D.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully pray that this Court decline to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered July 19, 1994, which upheld dismissal of certain discrimination and antitrust claims arising from the imposition of summary monitoring and suspension of Petitioner's medical staff privileges.

Straining to find grounds upon which to seek review of the lower courts' findings, Petitioner disregards the record and ignores the clear standard for accrual of a claim under 42 U.S.C. § 1981 established by this Court in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The statute commenced to run when he was notified of the summary suspension. The Ninth Circuit properly concluded, on the basis of the record, that Petitioner failed to meet the threshold requirements for application of state law equitable tolling doctrines.

Dismissal of Petitioner's Sherman Antitrust Act claim complied with the clear and unambiguous language of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11112(c)(2). The Ninth Circuit found "ample medical justification" in the administrative record for the summary imposition of restrictions on Petitioner's medical staff privileges and properly affirmed the District Court's judgment that the proceedings complied with HCQIA standards for peer review actions.

The Petition is nothing more than a request to reweigh and reexamine the lower courts' findings and presents no substantial question warranting review by this Court.

STATEMENT OF CASE

The pertinent facts and procedural history are cogently digested in the opinions of the District Court (Pet.App. 28a-35a and 68a-72a) and the Ninth Circuit (Pet.App. 8a-10a). Petitioner's Statement of the Case omits or misstates the following material facts relied upon by the lower courts in rendering their decisions.

Petitioner was a member of the Department of Obstetrics-Gynecology/Perinatology at Respondent Saint Agnes Medical Center from 1982 until he was summarily suspended on August 26, 1988. This suspension was effective

immediately upon imposition and Petitioner received notice of the suspension on August 29, 1988. (Pet.App. 28a.) This action was taken in response to Petitioner's performing a cesarean section without obtaining a consultation as required under certain monitoring requirements that had been summarily imposed upon Petitioner on June 23, 1987 and Petitioner's indication that he would not comply with the monitoring requirements in the future. (Pet.App. 33a-34a.)

In 1987, Petitioner had been granted temporary privileges to perform intra-abdominal laser surgery. (Pet.App. 28a.) After the first several cases performed by Petitioner, there were some concerns raised as to possible irregularities with respect to Petitioner's handling of these cases. An outside expert, Donald R. Ostergard, M.D., one of Petitioner's former mentors in intra-abdominal surgery, was consulted to review the cases. (Pet.App. 8a and 28a.) Dr. Ostergard concluded that Petitioner had used poor judgment in leaving one laser patient under anesthesia to deliver another obstetrical patient; had performed an unnecessary dilation and curettage on another patient and in a third case had shown lack of judgment in performing vaporization of endometriosis. In addition, Dr. Ostergard reported that these patients did not have a written or dictated history and physical examination on their charts at the time of the laser procedures. (Pet.App. 8a.) Shortly after the report was received, Dr. Fobbs wrote the hospital and claimed that he had done nothing wrong. (Pet.App. 9a.)

On June 23, 1987, the Medical Executive Committee (MEC) summarily imposed monitoring and consultation requirements on patients admitted by Petitioner to Saint Agnes Medical Center. (Pet.App. 9a.) At Petitioner's request, Judicial Review Committee (JRC) hearings were conducted in September of 1987 which affirmed the decision of the MEC to continue the monitoring requirements. Upon a stipulated order of the Appeal Board of the Board of

Trustees, the JRC hearing was reopened in January of 1988 to receive additional oral and documentary evidence. (Pet.App. 30a-31a.) The reopened JRC again affirmed the MEC's decision. (Pet.App. 31a.)

Upon Petitioner's appeal of the JRC's decision, the Board of Trustees of Saint Agnes Medical Center remanded the matter for a *de novo* hearing before a newly constituted JRC (hereinafter JRC Remand Hearing) on the grounds that Petitioner's counsel had wrongly been denied the right by the hearing officer to *voir dire* members of the JRC. The MEC acknowledged that Petitioner should have been allowed to *voir dire* members of the JRC. (Pet.App. 32a.)

On July 15, 1988, Petitioner announced that he would not participate in the remanded proceedings and would not appear at the scheduled *voir dire* of the JRC or the JRC Remand Hearing on August 1, 1988. The JRC Remand Hearing determined that Petitioner's withdrawal and failure to participate further in the proceedings was without good cause; Petitioner was deemed to have voluntarily accepted the monitoring requirements. (Pet.App. 33a.) Petitioner, however, was still permitted to admit and treat patients at the Saint Agnes Medical Center subject to the monitoring requirements. (Pet.App. 33a.)

Petitioner's medical staff privileges were thereafter summarily suspended on August 26, 1988 because Petitioner refused to comply with the monitoring requirements. This suspension was effective upon imposition. Petitioner received notification of the summary suspension on August 29, 1988. He was advised that he had the right to request a hearing regarding the summary suspension within fifteen (15) days. This deadline was subsequently extended for an additional fifteen (15) days. (Pet.App. 10a, 34a and 71a.)

On September 8, 1988, Petitioner filed a complaint with the Office for Civil Rights of the United States Department

of Health and Human Services (OCR) against Saint Agnes Medical Center (not Physician Respondents) alleging discrimination on the basis of race, color and national origin. (Pet. 12a.)

On September 29, 1988, Petitioner stated he would not appeal the summary suspension. On October 10, 1988, Petitioner was sent a letter confirming the fact that, by not requesting a Judicial Review Hearing within the allotted time, Petitioner had waived his right to a hearing and was deemed to have accepted his summary suspension. (Pet.App. 35a.)

In August of 1989, the OCR and Saint Agnes Medical Center entered into a Voluntary Settlement Agreement. Petitioner informed Saint Agnes Medical Center and OCR that he refused to accept the terms of the Settlement Agreement. (Pet.App. 35a.)

On September 29, 1989, Petitioner filed a complaint against Respondents, Holy Cross Health System Corporation and its subsidiary Saint Agnes Hospital and Medical Center (collectively Saint Agnes), and eleven (11) defendant physicians (collectively Physician Respondents) alleging federal claims for civil rights and antitrust violations arising from the imposition of monitoring requirements and summary suspension of his medical staff membership pursuant to: (1) the Sherman Antitrust Act; (2) 42 U.S.C. § 1981; (3) Title VI of the Civil Rights Act of 1964 (against Saint Agnes only); and (4) 42 U.S.C. § 1985(3). (Pet.App. 35a.)

The District Court subsequently dismissed with prejudice Petitioners § 1985(3) claim against Physician Respondents and his Title VI Claim against Saint Agnes for failure to state a claim; granted Physician Respondents' Motion for Partial Summary Judgment as to Petitioner's § 1981 claim on the grounds that the claim was time barred; and granted

Respondents' Motion for Summary Judgment as to Petitioner's claim for relief under the Sherman Antitrust Act on the basis that the qualified immunity from such a claim under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101 *et seq.* applied.

Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the Ninth Circuit. On July 19, 1994, the Ninth Circuit *reversed* the District Court's dismissal of Petitioner's § 1985(3) claim against Physician Respondents and his Title VI claim against Saint Agnes finding that on the pleadings, causes of action could be stated with respect to alleged racial discrimination against Dr. Fobbs individually. Dismissal was *affirmed* with respect to allegations of discrimination against Dr. Fobbs' patients. (Pet.App. 26a.) The Ninth Circuit also *affirmed* the District Court's grant of summary judgment with respect to Petitioner's § 1981 claim and Petitioner's Sherman Antitrust Act claim. *Id.* at 26a-27a.

REASONS FOR DENYING THE WRIT

I.

The United States Court of Appeals for the Ninth Circuit correctly upheld summary judgment on Petitioner's 42 U.S.C. § 1981 claim based upon the expiration of the statute of limitations pursuant to the standards for accrual established by this Court.

A. Petitioner's cause of action accrued on the date Petitioner was notified that he was summarily suspended.

Petitioner fundamentally misapprehends the standard governing the accrual of a cause of action under 42 U.S.C. § 1981 established by this Court. Pursuant to the authority of *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) and *Chardon v. Fernandez*, 454 U.S. 6 (1981),

Petitioner's cause of action accrued on August 29, 1988, the date that the MEC notified Petitioner that it had summarily suspended his medical staff privileges. The notice stated that Petitioner could request a hearing on the matter within fifteen (15) days, which he failed to do. The summary suspension became effective immediately upon imposition and remained in effect pending the outcome of a hearing, had Petitioner requested one. (Pet.App. 35a.)

That conclusion is inescapable when the record below is read in the context of controlling precedent. In *Delaware State College*, the limitations period commenced on the day that the tenure decision was made and communicated to the plaintiff (Ricks), even though Ricks' employment with the college was not terminated until a later date. This Court reasoned that grievance procedures, such as the ability to request a hearing, "by its nature, is a remedy for a prior decision, and not an opportunity to influence that decision before it is made." 449 U.S. at 261. The alleged wrongful denial of Ricks' tenure was the discriminatory act triggering the accrual of the claim and that denial was held to be effective upon Ricks' receiving *notification.* (*Compare* Pet.App. 12a and 16a.)

Similarly, in *Chardon*, the limitations period was held to run from the time of notice that plaintiffs' appointments as non-tenured administrators would terminate. 454 U.S. at 8.

Following this Court's well-settled precedent, the Ninth Circuit properly held in the present action that a discrimination claim cognizable under federal law accrues at the time petitioner knows or should have known of the allegedly discriminatory decision.

B. There was no "continuing violation" of 42 U.S.C. § 1981 by virtue of notices advising Petitioner of his remedies following the MEC's summary suspension of his medical staff privileges on August 26, 1988.

Turning to Petitioner's claim of an alleged "continuing violation" under 42 U.S.C. § 1981, there is no showing of discriminatory acts beyond his summary suspension of medical staff privileges on August 26, 1988 as required under *Delaware State College, supra*, 449 U.S. at 258 and 260. In order to toll commencement of the limitations period *after* the date of the decision to deny Ricks' tenure, this Court stated:

> "Ricks would have had to allege and prove the manner in which his employment was terminated differed discriminatorily from the manner in which the college terminated other professors who had been denied tenure." *Id.* at 258.

Here, as in the prior decisions of this Court, Petitioner made no factual showing of "illegal acts subsequent to the date on which the decisions to terminate [or in this case, to suspend medical staff privileges] were made . . ." *Chardon, supra*, 454 U.S. at 8. Hence, the action was time barred if not brought within one year after being notified of the suspension. *Delaware State College, supra*, 449 U.S. at 258.

Petitioner nevertheless contends that the statute should have been tolled until October 10, 1988 when he received a letter finalizing his suspension and rejecting Petitioner's request for what he perceived to be "fair hearing conditions." (Pet. 14 and Pet.App. 16a.) The record amply supports the lower courts' findings that "beyond his conclusory allegation that the hearing procedure [afforded by MEC] would have been 'unfair,' Dr. Fobbs has not alleged that 'after August 26, 1988, he was treated differently than other Medical Staff Members.' . . . Dr. Fobbs fails to show

how Defendants discriminated against him by adhering to St. Agnes bylaws in conducting their hearings and review process." (*Id.* at 16a.)

Petitioner's argument also ignores the well-settled rule stated in *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981):

> "[O]ur focus in determining whether the alleged civil rights violation is 'continuing' is upon the issue of whether a present violation still exists, not upon the present effect of a past employment decision . . . Absent special circumstances, a single act by an employer adverse to an employee's interest, such as a discharge, layoff, or failure to transfer or promote, begins running of the statute of limitations and *natural effects* of the allegedly discriminatory act are not regarded as 'continuing.'" (Emphasis Added.)

Accordingly, Petitioner failed to demonstrate that "independent acts of discrimination" continued beyond the date of the MEC's decision to summarily suspend his medical staff privileges. *Delaware State College, supra*, 449 U.S. at 257 n.8. (Pet.App. 16a-17a.)

C. Petitioner's exhaustion of internal administrative remedies did not toll the statute of limitations.

Petitioner further erroneously maintains that federal law requires that he exhaust his internal administrative remedies before a decision is "final." (Pet. 13 and Pet.App. 15a-16a.) There is no requirement that he "exhaust his internal administrative remedies" prior to filing a § 1981 claim. *Delaware State College* expressly rejected the tolling of the limitations period pending internal administrative remedies. The "pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the statutory period." 449 U.S. at 261 citing *Electrical Workers v. Robbins Myers, Inc.*, 429 U.S. 229

(1976). *Accord Gonzalez v. Shanker*, 533 F.2d 832 (2d Cir. 1976); *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732 (3d Cir. 1983); *Goss v. Revelon, Inc.*, 548 F.2d 405 (2d Cir. 1976); *Jones v. Niagara Frontier Transp. Auth.*, 524 F. Supp. 233 (W.D.N.Y. 1981); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646 (9th Cir. 1988). (*See* Pet.App. 12a, 16a and 73a.)

Petitioner attempts to distinguish this consistently applied line of authority by suggesting he did not receive "unequivocal" notification of his suspension or the procedures by which he might challenge that action. (Pet. 12-13.) His contention is belied by the lower courts' findings, and his reliance upon *Hoesterey v. City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991) is misplaced. Consistent with the reasoning of *Delaware State College* and its progeny, *Hoesterey* found that plaintiff's claim for discriminatory termination did not accrue because he was not properly advised *in writing* of his right to a pre-termination hearing. Because of the defective notice the statute was tolled until the last day of plaintiff's employment. *Id.* at 320.

By contrast, in the present case, notice of suspension was admittedly received and Petitioner was specifically advised by that notice of his right to request a hearing within 15 days thereafter. (Pet.App. 34a and 68a-69a.)

II.

The United States Court of Appeals for the Ninth Circuit correctly declined to apply state law tolling doctrines to the accrual of Petitioner's 42 U.S.C. § 1981 claim.

A. The statute of limitations was not tolled under California's equitable tolling doctrine.

Although California's one-year statute of limitations applies to Petitioner's § 1981 claims, federal law governs when

the claim accrues and the limitations period begins to run. *Chung v. Pomona Valley Community Hosp.*, 667 F.2d 788, 791 (9th Cir. 1982). Petitioner failed to satisfy the threshold requirements for application of state law equitable tolling doctrines. (Pet.App. 13a.)[1]

Petitioner made no showing that "applying the equitable tolling doctrine to a § 1981 claim would not be inconsistent with federal policy." (Pet.App. 14a.) Petitioner's Title VI grievance through the OCR was not designed to address the same wrongs and grant the same remedies as a § 1981 claim as required by *Johnson v. Railway Express Agency,* 421 U.S. 454, 461 (1975). (Pet.App. 14a-15a.) Pursuit of Title VI remedies does not toll the statute of limitations applicable to a § 1981 claim in any event. *Chambers v. Omaha Pub. Sch. Dist.*, 536 F.2d 222, 230-31 (8th Cir. 1976).

As the Ninth Circuit stated: "Congress has not proscribed civil rights plaintiffs from filing § 1981 actions while an OCR investigation is pending. Furthermore, Dr. Fobbs has made only a conclusory showing, insufficient under *Railway Express Agency,* that OCR procedures and his § 1981 claim were designed to address the same wrongs and grant the same remedies." (Pet.App. 15a). Thus, Petitioner failed to meet the threshold requirements necessary to invoke California's equitable tolling doctrine. *Accord Donoghue v. County of Orange,* 848 F.2d 926, 930 and 931 (9th Cir. 1987); *Chardon v. Fumero Soto,* 462 U.S. 650, 657 (1983); *Arnold v. United States,* 816 F.2d 1306, 1312 (9th Cir.

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[1]State tolling laws are only applicable to federal causes of action to the extent that they are not inconsistent with the Constitution or other federal law. *Donoghue v. County of Orange,* 848 F.2d 926, 930 (9th Cir. 1987); *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980). In the present case, there is no statute which requires exhaustion, nor is there an agency established to hear § 1981 claims.

1987), *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980).

B. Respondents were not "equitably estopped" from asserting the statute of limitations.

Supported by the record below, the lower courts likewise properly found that Petitioner's equitable estoppel arguments were meritless under state or federal law. No representations were made by Respondents "regarding the statute of limitations nor when Dr. Fobbs' possible legal actions would accrue. Furthermore, it is abundantly clear from the record that Dr. Fobbs did not believe anything that the Defendants wrote or said to him, and he certainly was not misled." (Pet.App. 17a.)

III.

The United States Court of Appeals for the Ninth Circuit correctly upheld summary judgment on the Sherman Antitrust Act claim where Respondents' imposition of summary monitoring and subsequent summary suspension of Petitioner's medical staff privileges were found by the courts below to have complied with the Health Care Quality Improvement Act standards for such peer review actions.

A. The Health Care Quality Improvement Act expressly allows that a summary restraint may be imposed "where the failure to take such action may result in an imminent danger to the health of any individual."

Disposing of Petitioner's Sherman Antitrust Act claim, the Ninth Circuit correctly interpreted the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C.

§ 11112(c)(2), in keeping with the clear and unambiguous language of the statute itself:

> "subject to subsequent notice and hearing and other adequate procedures, where the failure to take such action *may* result in an imminent danger to the health of any individual." (Emphasis Added.)

Thus, contrary to Petitioner's position (Pet. 15-16), "the statute *does not require imminent danger* to exist before a summary restraint may be imposed. It only requires that the danger *may* result if the restraint is not imposed." (Pet.App. 9a.) (Emphasis added.)

Without citation to any authority, Petitioner urges that a different standard should apply under HCQIA before summary restraints are imposed. He suggests that "merely because there *may* be a danger in the future, then the Ninth Circuit has completely eliminated all protections for all doctors from summary restrictions of privileges." (Pet. 15.) Such fears are overblown, particularly when viewed against the factual background of the lower courts' findings.

The Ninth Circuit found "ample medical justification" in the administrative record for the MEC's summary imposition of monitoring; *i.e.,* that there was no legitimate factual dispute that the potential for imminent danger existed when the restraint was imposed. An outside expert, who was consulted by the MEC prior to the imposition of the restraint, found that Dr. Fobbs used poor judgment in leaving a laser patient under anesthesia to deliver another obstetrical patient; performed an unnecessary dilation and curettage on another patient; lacked judgment in performing vaporization of endometriosis on a third patient; and failed to provide these patients with a written or dictated history and physical examination on their charts at the time of the laser procedures. In addition, upon review of this evidence, Dr. Fobbs still maintained that he had done no wrong.

(Pet.App. 9a.) This evidence clearly shows that Petitioner's patients had been exposed to poor medical judgment and unnecessary procedures which Petitioner refused to acknowledge. Therefore, contrary to Petitioner's claim, the record supported the MEC's conclusion that there was a potential for imminent danger if the restraint was not imposed. (Pet.App. 8a-9a.)

Under the statutory scheme, due process is satisfied if subsequent to the summary imposition of restrictions, there is some "notice and hearing and other adequate procedures" for appeal of the administrative determination. Petitioner indisputably received notice and had the opportunity for a hearing after the summary imposition of monitoring. (Pet.App. 30a and 58a-59a.) Thus, there is no substantial issue as to whether Petitioner was afforded notice and due process.

B. The peer review actions complied with the Health Care Quality Improvement Act standards.

Finally, Petitioner disagrees with the manner in which the lower courts applied HCQIA standards to the intermediary hearings and their findings that the peer review actions taken complied with those standards. (Pet.App. 7a-10a, 50a-52a and 56a-59a.)

The District Court's determination of this issue was based in part upon Petitioner's refusal, without good cause, to proceed with the JRC Remand Hearing; and his concomitant forfeiture of rights under the statute. 42 U.S.C. § 11112(b)(3)(B). The defect in the JRC hearings in September of 1987 and January of 1988, whereby Petitioner was not allowed to voir dire the JRC panel, was acknowledged by the MEC. Petitioner then was afforded a new JRC Remand Hearing with the right to voir dire a new JRC panel which would hear the evidence *de novo*. (Pet.App. 31a-32a.) Thereafter, Petitioner refused to participate in

either the voir dire of the new JRC panel or the JRC Remand Hearing. (Pet.App. 33a.) The District Court affirmed the finding of the JRC Remand Hearing that Petitioner's "failure to appear was not supported by good cause." (Pet.App. 33a and 59a.) Under § 11112(b)(3)(B) of the HCQIA, where a physician refuses to participate in a hearing without good cause, he forfeits his right to a hearing. § 11112(b)(3)(B) provides that:

> "the right to the hearing may be forfeited if the physician fails, without good cause, to appear."

Petitioner was afforded due process in this case; he simply "opted not to exercise his right thereto." (Pet.App. 59a.) As a result, he was deemed under the statute to have forfeited his right to a hearing with respect to the summary imposition of monitoring.

Moreover, a mere procedural defect in a hearing does not constitute a failure to meet HCQIA standards. Section 11112(b)(3) provides that

> "[a] professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the [notice and hearing requirements]."

The determination of whether peer review actions meet the HCQIA standards is a matter requiring a full evaluation of the entire record. The District Court reviewed the evidence with regard to the "defects" in the JRC hearings in September 1987 and January 1988 and concluded that the hearing process had been conducted fairly in accordance with those standards. There is no purported "conflict" (Pet. 20) between the Ninth Circuit's affirmance of that determination in this case and the definition of "peer review action" articulated in its prior decision of *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992). The immunity provided by the HCQIA was correctly applied to both

Physician Respondents and Saint Agnes. *See Imperial v. Suburban Hospital Assn., Inc.*, 37 F.3d 1026, 1030 (4th Cir. 1994); *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1322, 1337 (11th Cir. 1994).[2]

The Petition amounts to nothing more than a request to reexamine and reweigh these findings contrary to the principle that it is not the function of this Court "to grant a certiorari to review evidence and to discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The Ninth Circuit's decision upholding dismissal of Petitioners' claims is correct. It does not conflict with any decision of this Court or any other Court of Appeals. Accordingly, there is no substantial issue warranting review by this Court.

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[2]It is indeed puzzling for Petitioner to contend that the recognition of procedural defects, and the correction of them during the administrative appeal process, somehow rendered the proceedings unfair and abrogated Respondents' HCQIA immunity. As the District Court aptly put it, "This is nonsensical. The standard is intended to apply to discrete decisions, not to an ongoing course of conduct. . . . [¶]It would be a nearly insurmountable chore for these defendants, or any defendants, to attempt to prove HCQIA immunity for each aspect of their entire course of conduct in response to a plaintiff's general allegations of misconduct. Such a duty would reduce the efficaciousness of the HCQIA and defeat Congress' stated purpose in promulgating it." (Pet. App. 52a.)

CONCLUSION

For all the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 94-994

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In The

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October Term, 1994

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Petitioner,

vs.

HOLY CROSS HEALTH SYSTEM CORPORATION, a California Corporation, doing business as SAINT AGNES HOSPITAL AND MEDICAL CENTER; CYNTHIA BERGMANN, M.D.; JAMES CAHILL, M.D.; JAY CHRISTENSEN, M.D.; CHARLES GAVIN, M.D.; SEUNG NAM KIM, M.D.; ROBERT MELTVEDT, M.D.; MARSHALL NOEL, M.D.; MORTON ROSENSTEIN, M.D.; ROYDON STEINKE, M.D.; ROBERT WILSON, M.D.; and LARRY E. NIX, M.D.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner filed his petition for writ of certiorari on December 1, 1994, and the respondents have filed their brief in opposition to said petition. Petitioner hereby submits the following reply to respondents' brief in opposition.

The Ninth Circuit's erroneous use of summary judgment to deprive petitioner of his Fifth Amendment right to a trial presents viable and important grounds for granting certiorari. The courts and counsel should be clearly apprised of the date of accrual of a right of action based upon a decision made by an administrative body. The date of accrual should be when the decision has actually, finally been made, and a litigant should not have to guess about that date.

The decision of the Ninth Circuit upholding summary judgment based upon the Health Care Quality Improvement Act of 1986 similarly presents important grounds for certiorari. The immunity provisions of the Health Care Quality Improvement Act of 1986 have not been given a definitive interpretation. There is considerable doubt among the bench and bar concerning when, and to what proceedings, those immunity provisions apply.

The Ninth Circuit opinion in the instant case has sown the seeds of confusion. With its vague standard that summary privilege restrictions may be imposed without due process so long as there is a possibility of future medical harm, the Ninth Circuit has given hospitals and bureaucratic administrative committees an opportunity to summarily suspend physicians whenever desired. Virtually any medical procedure — from a tonsillectomy to the prescription of medication — may potentially give rise to future harm. Similarly, the Ninth Circuit has created confusion concerning the proceedings to which Health Care Quality Improvement Act standards apply.

PETITIONER'S REPLY TO RESPONDENTS' "STATEMENT OF CASE"

While respondents accuse — without citation — petitioner of omitting or misstating material facts, respondents allude only to *petitioner's* appendix presented in support of this petition for writ of certiorari. Respondents' accusations are not supported by any documents suggesting the omission or misstatement of material facts by petitioner.

Furthermore, it is respondents who are guilty of misstating and distorting facts. Thus, respondents suggest at page three of "Respondents' Brief in Opposition" that Dr. Ostergard criticized the three cases of petitioner which were referred to Dr. Ostergard for review. That is not correct. As the trial judge acknowledged in one of his opinions:

> Dr. Ostergard's report is interpreted differently by plaintiff and defendants. Defendants assert that Dr. Ostergard was critical of plaintiff's management of the cases which were submitted for his review, while plaintiff asserts that Dr. Ostergard was primarily critical of the hospital. Both assertions are true to an extent.

(Appendix, p. 29a).

Furthermore, the trial judge acknowledged that he was concerned by the fact:

> . . . that defendants decided to continue the monitoring system despite the fact that Dr. Ostergard concluded that plaintiff had provided adequate care in two of the three original cases and that, with regard to the

> third case, two other doctors agreed that plaintiff's actions therein were reasonable[14].

(Appendix, p. 69a).

> In a footnote, the court further acknowledged:
>
> 14. The court's concern is somewhat intensified by the fact that numerous other submissions by plaintiff reflect that other outside evaluators believe that his handling of the eight cases on contention was generally adequate.

(Appendix, p. 60a, fn. 14).

The record therefore clearly indicates that Dr. Ostergard was not the critic of petitioner that respondents would portray. Dr. Ostergard and other physicians verified that petitioner's medical treatment was reasonable and appropriate.

FURTHER REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erroneously Upheld Summary Judgment Based on a One-Year Statute of Limitations Where the Wrongful Act Was Not Complete Until Less Than One Year Prior to the Filing of the Underlying Complaint.

Respondents rely on *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), to argue that petitioner's cause of action accrued on August 29, 1988, the date that the MEC notified petitioner that it had summarily suspended his medical staff privileges. (Respondents' Brief in Opposition, pp. 6-7). Respondents attempt to analogize the instant case to *Delaware State College v. Ricks* wherein a college teacher was denied

tenure, that decision was finally communicated to the college teacher on the date of accrual, and thereafter the college teacher pursued grievance procedures. This Court held that the cause of action accrued upon the making and communication of the tenure decision. The *Ricks* scenario, however, is not present in the instant case.

Unlike *Ricks,* wherein a decision was finalized and the party thereafter pursued proceedings attacking the decision, when an administrative body acts to suspend hospital privileges of a physician in a hospital, the final decision is not made until all facets of the administrative body's procedure have concluded. (*See, e.g., Bollengier v. Doctors' Medical Center,* 222 Cal. App. 3d 1115, 1124-1127 (1990)). As the First Circuit has pointed out in *Johnson v. General Elec.,* 840 F.2d 132, 134-139 (1st Cir. 1988), the *Ricks* holding does not extend to situations wherein the action giving rise to the lawsuit is not final. In hospitals, *Bollengier* expressly holds that such decisions are not final until the administrative process runs out. Tenured decisions in universities — as in *Ricks* — may be final in some other fashion. The discussion in *Hoesterey v. City of Cathedral City,* 945 F.2d 317, 319-320 (9th Cir. 1991) also illustrates the inapplicability of *Ricks.* Like *Hoesterey,* petitioner in the instant case challenges the specific process and practices accompanying his suspension; in such a case, to trigger the statute of limitations, petitioner needed to have received notice not only of the summary suspension decision, but also that the decision was final and that it would be followed by no further process. That did not occur until, at the soonest, September 30, 1988.

It should also be observed that the position espoused by respondents is inherently inconsistent. On the one hand as to the Health Care Quality Improvement Act immunity issue, respondents claim immunity for all earlier acts during the administrative process on the theory that *at the end of the process* they provided a fair hearing. However, in seeking to invoke an

early statute of limitations date, respondents assert that actions before the conclusion of the process may be treated as independent. Respondents seek (and the Ninth Circuit has provided) the right to have their cake and eat it too.

Respondents misconceive the significance of the notion of "exhaustion of internal administrative remedies" in connection with the date of accrual of an administrative "act." As is clear in cases such as *Bollengier* and *Hoesterey,* there are instances — and this case is one — wherein the administrative act itself is not "final" until the process has finally concluded. The administrative procedure in *Ricks* was of a different nature. That procedure was not a "decision-making" procedure, but rather was a "grievance procedure."

Dr. Fobbs was a physician on the staff and entitled to the rights and privileges thereof unless and until an administrative process resulted in some final act terminating or suspending his membership. He was not an applicant who had been rejected who had the right afterward to invoke a grievance procedure challenging the action. Whether or not "exhaustion" would be a prerequisite to a federal civil rights action is a completely irrelevant consideration. The point is that the wrongful act was not accomplished *until* finally effectuated through conclusion of he administrative process.

II. The Ninth Circuit Erred in Upholding Summary Judgment Based Upon the Expiration of a One-Year Statute of Limitations Where the Petitioner Set Forth a Showing of Equitable Tolling.

Respondents' arguments fail to address the fact that *Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1275 (D.C. Cir. 1991) held that discrimination on the basis of race in the monitoring and supervision of a physician may give rise to a private cause of action under 41 U.S.C. § 1981, showing that the

claims by petitioner in his complaint to the Office of Civil Rights were *not* "separate and distinct" from his claims in this action. Further, respondents have not addressed their failure to raise, as required by *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986), the contention that the application of equitable tolling would be inconsistent with federal policy. It is only after the moving party raises a contention that the opposing party has the duty to show a genuine issue for trial. (*Id.* at p. 324).

Moreover, it does not require a lengthy evidentiary showing to justify the conclusion that federal policy favoring non-discriminatory practices would support the application of equitable tolling while a complaint is pending with the Office of Civil Rights. Such application would encourage immediate and prompt resort to the appropriate *federal* agency before the filing of a civil lawsuit. Obviously, federal policy is promoted by encouraging litigants to resolve their differences through federal administrative offices.

III. The Ninth Circuit Erred in Upholding Summary Judgment Premised on the Expiration of a One-Year Statute of Limitations Where the Petitioner Showed That the Respondents Made Representations to Petitioner, Relied Upon by Petitioner, That the Wrongful Act Would Not Be Complete Until a Time Within One Year of the Filing of the Underlying Complaint.

Respondents seek to avoid the effect of respondents' notices to petitioner that his summary suspension would not be final until September 30, 1988. Respondents — and the Ninth Circuit opinion — make the fatuous assertion that "Dr. Fobbs did not believe anything that the defendants wrote or said to him, and he certainly was not misled." (Respondents Brief in Opposition, p. 12; Appendix, p. 17a). While Dr. Fobbs perhaps had little confidence in the integrity of respondents, Dr. Fobbs was beyond doubt misled by the notices suggesting that the statute of

limitations would begin running on September 30, 1988. This fact is apparent merely from the date of filing of the underlying lawsuit — September 29, 1989 — *one day before the expiration of that one-year period.* (Appendix, p. 35a).

IV. The Ninth Circuit Erred in Upholding Summary Judgment Premised on the Expiration of a One-Year Statute of Limitations Where the Petitioner Showed a Continuing Violation of 42 U.S.C. § 1981, Such That the Last Discriminatory Act Occurred Within One Year of the Filing of the Underlying Complaint.

Respondents' argument and the trial court decision suggest that it would not be discriminatory to deny petitioner fair hearing conditions — a panel without direct competitors — merely because such denial was justified by invoking the hospital's bylaws. However, petitioner made it clear that the peer review process was utilized against him in a racially discriminatory fashion. The denial of a fair hearing panel at the end was one more discriminatory act. The allegation of a continuing course of intimidation, harassment and disparate treatment of an individual has been held to allege a continuing violation according to *Sosa v. Hiraoka*, 920 F.2d 1451, 1457-1458 (9th Cir. 1990).

V. The Ninth Circuit Erred in Upholding Summary Judgment Based Upon the Health Care Quality Improvement Act Where the Petitioner Produced Evidence of No Imminent Harm While the Respondents Failed to Produce Evidence of Imminent Harm, and Where the Ninth Circuit Based Its Decision on the Existence of a Mere "Possibility" of Harm Supporting a Summary Action.

Respondents attempt to minimize the bizarre standard created by the Ninth Circuit when it held in this case that the statute "does not require imminent danger to exist before a

summary restraint may be imposed." (Appendix, p. 9a). Respondents state that petitioner does not rely on "authority" in questioning the Ninth Circuit's interpretation. To the contrary, petitioner very clearly asserted that the Ninth Circuit's selection of a non-standard — the mere possibility of future harm — to allow summary privilege restrictions "effectively strips physicians of *all* due process protections." (Petitioner, p. 17). Petitioner's right to due process emanates from the Fifth Amendment of the United States Constitution. (Petition, p. 3). Presumably, the United States Constitution is still considered "authority" supporting a legal argument.

Respondents assert that petitioner's "fears are overblown" concerning the blank check given by the Ninth Circuit to suspend — without any hearing or due process — the privileges of physicians. That is easy for respondents to say. They are the *imposers* of summary suspensions, not the *recipients*. Literally *every* medical procedure has a potential for future danger. The Ninth Circuit has given carte blanche to respondents to violate the anti-trust laws with impunity.

VI. The Ninth Circuit Erred in Upholding Summary Judgment Based Upon the Health Care Quality Improvement Act Where the Petitioner Has Shown Deviation From the Health Care Quality Improvement Act Standards as to Peer Review Actions Prior to the Final Peer Review Action.

Respondents claim that so long as the final peer review action is appropriate, all prior misconduct should be immunized. Respondents assert that their "recognition of procedural defects, and the correction of them during the administrative appeal process," justify immunity. (Respondents' Brief in Opposition, p. 16, fn. 2). Respondents invoke the District Court's assertion that the standards are intended to apply to "discrete decisions, not to

an ongoing course of conduct." (Respondents' Brief in Opposition, p. 16, fn. 2).

The problem with respondent's analysis is that it would allow months and years of wrongful anti-competitive conduct with impunity whenever the respondents finally, at the end of that conduct, provided a proper hearing. It is not the "recognition of procedural defects and the correction of them" that results in loss of immunity. It is the *previous wrongful hearings* that are not immunized. Thus, petitioner may have no claim to damages based a final, proper hearing. He may be limited to the damages caused by the two previous improper hearings.

The trial court's "discrete decision" commentary — embraced by the Ninth Circuit and by respondents — affords no basis for immunizing respondents for intermediate "discrete decisions" which are wrongful in nature and have caused petitioner harm. The District Court, the Ninth Circuit, and respondents have made a nonsensical leap from the premise that the HCQIA immunity applies to discrete decisions to the "conclusion" that it immunizes *everything,* so long as an eventual fair hearing is offered. Repondents' position that the eventual final hearing immunizes everything that goes before is also inconsistent with respondents' attempt to make intermediate decisions independently operative to trigger the running of the statute of limitations.

Respondents assert, without analysis, that the current decision is not inconsistent with *Austin v. McNamara,* 979 F.2d 728 (9th Cir. 1992.) It is patently clear, however, that such conflict exists. Under *Austin,* the HCQIA standards would apply to the first two JRC hearings, which were admittedly defective. The respondents would not be immunized for the consequences of — damages caused by — *those particular hearings.*

CONCLUSION

For the reasons herein stated, this Petition for Writ of Certiorari should be granted. The bench and bar nationwide urgently need an interpretation by this court of the Health Care Quality Improvement Act standards. Respondents have complained about the lack of "authority" — presumably referring to cases — cited by petitioner in his argument addressing the Ninth Circuit's adoption of the "standard" of "possible harm." One of the reasons it is important for this Court to grant certiorari is the very paucity of cases addressing that issue, and other aspects of the HCQIA. Physicians, such as Dr. Fobbs, are entitled to have this Court speak concerning the extent to which physicians' hospital privileges will be protected by a right of due process.

Respectfully submitted,

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